

COLLECTIVE INVESTMENT SCHEMES  
IN LUXEMBOURG

Law and Practice

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# COLLECTIVE INVESTMENT SCHEMES IN LUXEMBOURG

Law and Practice

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# INTRODUCTION TO THE FIRST EDITION IN ENGLISH

Eight years have passed since the publication of the first edition of our compendium on undertakings for collective investment (UCIs) in French.

Many new laws and regulations have been adopted during this period, mainly at the initiative of the EU authorities. This prompted the publication of a second edition in French in 2006.

It is not by accident that this book has come about. Although undertakings for collective investment have a long history in the Grand Duchy of Luxembourg, they had never previously been the subject of a systematic review and legal analysis. We could not allow this opportunity and challenge to pass.

Drafted by and for practitioners, this work is a handbook rather than a treatise. Its purpose is to enable the interested reader to understand the legal operation of UCIs and to provide immediate and practical answers. The law on UCIs is discussed by theme, from the creation of a UCI to its liquidation. The obligations connected with banking secrecy and the prevention of money laundering are discussed in detail, as are the tax rules governing UCIs and their participants. The impact of Community law on these aspects is explained in a separate chapter.

This edition also reflects recent legislative changes in the European Union and in the Grand Duchy of Luxembourg which impact on UCIs. Recent EU directives which affect UCIs include the 'Prospectus', 'MiFID', and 'Savings Taxation' Directives. Legislation passed in the Grand Duchy of Luxembourg in 2007 created the framework for the so-called 'specialized' investment funds, thereby increasing the types of UCIs available to qualified investors.

This edition in English is the result of a strong demand from all those market participants who are not familiar with the French language. It has been updated from the second edition in French published in November 2006 in all major aspects which are relevant, although some of them could not be analysed in as much detail as we would have liked. Furthermore, the proposed new regulation on coordinated UCITS, generally referred to as 'UCITS IV', has not been addressed, as, at the time of writing this introduction, no formal proposals from the European Commission have been adopted.

The English used in this edition has been monitored and improved by Denise Kinsella, an Irish lawyer based in Dublin. Denise is a former partner of the law firm Dillon Eustace and currently works as an independent director of, and consultant to, several Irish investment funds. We are most grateful for the significant improvements made by Denise, not only from a language point of view, but also in terms of clarity.

We also wish to thank our partners and associates at Arendt & Medernach for their specialist contributions to the contents of the book. We are extremely grateful for their support without which this work could not have been accomplished.

Last but not least, we would like to thank the readers of the previous editions—clients and friends—whose constructive comments have, we hope, allowed us to provide a more thorough analysis of the laws on collective investment schemes.

Claude Kremer and Isabelle Lebbe  
Luxembourg  
June 2008

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## PREFACE TO THE FIRST EDITION IN FRENCH

This work written jointly by Maîtres Claude Kremer and Isabelle Lebbe immediately impressed me on account of its thoroughness and, in particular, its scope. Whilst undertakings for collective investment have been the subject of many dissertations, I am not aware of any work that covers all of their aspects so completely.

The growing importance of UCIs for the financial market renders the contribution made by this book even more significant: designed as a reference tool, it can be used to track the development of a sector which has undergone persistent and permanent change in recent years. For that reason, I am convinced that it will become the virtually indispensable companion of practitioners, both in Luxembourg and elsewhere.

These pages show that Luxembourg has not only managed to create a general environment and a legal framework in which undertakings for collective investment can prosper, but that it has also built up a relevant body of legal opinion, which is explained clearly and fully in this book.

In conclusion, I sincerely hope that other authors will follow this example and write handbooks of similar quality for other market activities.

Jean-Nicolas Schaus  
Director General  
Commission de Surveillance du Secteur Financier  
June 2000

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## CONTENTS—SUMMARY

<i>Table of Cases</i>	xxxv
<i>Tables of Legislation, Treaties, and Conventions</i>	xxxvii
<i>List of Abbreviations</i>	xlvii
<b>1. Introduction</b>	1
<b>2. Classification of Undertakings for Collective Investment</b>	25
<b>3. Permitted Activities for Undertakings for Collective Investment</b>	65
<b>4. Establishment of Undertakings for Collective Investment</b>	161
<b>5. Securities Issued by Undertakings for Collective Investment</b>	195
<b>6. Parties Involved in the Operation of Undertakings for Collective Investment</b>	245
<b>7. Marketing the Units of Undertakings for Collective Investment in the Grand Duchy of Luxembourg</b>	341
<b>8. Supervision of Undertakings for Collective Investment</b>	369
<b>9. Dissolution and Restructuring of Undertakings for Collective Investment</b>	411
<b>10. Undertakings for Collective Investment and Criminal Law</b>	435
<b>11. Undertakings for Collective Investment and Tax Law</b>	463
<b>12. Undertakings for Collective Investment and European Law</b>	513
<b>13. Risk Capital Investment Companies</b>	539
<b>14. Securitization Vehicles</b>	583
<i>Select Bibliography</i>	597
<i>Index</i>	605

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# CONTENTS

<i>Table of Cases</i>	xxxv
<i>Tables of Legislation, Treaties, and Conventions</i>	xxxvii
<i>List of Abbreviations</i>	xlvii

## 1. Introduction

Definition of Undertaking for Collective Investment	1.01
Collective investment of savings	1.03
Investment according to the principle of risk spreading	1.05
Raising capital from the public	1.06
Historical Background	1.13
Legal Sources	1.23
Specific laws and regulations applicable to UCIs	1.23
Chronological record of laws and regulations	1.23
Grand-Ducal Decree of 22 December 1972 concerning the supervision of investment funds	1.23
1983 Act concerning undertakings for collective investment	1.26
1988 Act concerning undertakings for collective investment	1.32
Content	1.32
Amendment of the 1988 Act	1.38
Act of 19 July 1991 concerning undertakings for collective investment whose securities are not intended for the public	1.45
Act of 20 December 2002 with regard to undertakings for collective investment	1.46
Content	1.46
Acts amending the 2002 Act	1.61
Act of 13 February 2007 relating to specialized investment funds	1.66
Circulars issued by the supervisory authorities	1.67
Laws and regulations not limited to UCIs	1.74
Role of the CSSF	1.77
General presentation	1.77
Supervision of UCIs	1.81
UCIs established in the Grand Duchy of Luxembourg	1.81
UCIs established in foreign countries	1.86

Coordinated UCITS	1.86
Other UCIs under foreign law	1.89
Supervision of management companies	1.91
Management companies established in the Grand Duchy of Luxembourg	1.91
Management companies established in foreign countries	1.94
<b>2. Classification of Undertakings for Collective Investment</b>	
Classification of UCIs by Reference to their Investment and Sales Activities	2.01
UCITS governed by Part I of the 2002 Act	2.02
Exclusive investment in transferable securities and other instruments governed by Directive 85/611	2.07
Marketing to the public in the EEA	2.14
UCITS whose units are reserved for sale to the public in non-EEA countries	2.17
UCITS whose units are sold without promotion within the EEA	2.22
Mandatory redemption of units at the investors' initiative	2.25
Exclusion from coordinated status because of investment and borrowing policy	2.35
UCIs governed by Part II of the 2002 Act	2.36
Closed-end UCITS	2.37
UCITS that raise capital without promoting the sale of their units to the public in the whole of the EEA or any part thereof	2.38
UCITS whose units, under their constitutive documents, may be sold only to the public in countries that are not members of the EEA	2.40
Specific categories of UCITS determined by the CSSF	2.42
Specialized investment funds within the meaning of the Act of 13 February 2007	2.50
History	2.50
Scope of the Act of 13 February 2007	2.61
Concept of the well-informed investor	2.61
Concept of institutional investor	2.63
Concept of professional investor	2.72
Concept of other well-informed investor	2.76
Managing persons and any other Managers of SIFs	2.77
Scope of the Act of 13 February 2007 compared with the 2002 Act	2.79
Supplementary character of the Act of 13 February 2007	2.85

Legal regime governing specialized investment funds	2.87
Qualifying criteria	2.87
Legal forms	2.88
Authorization of conducting persons	2.89
Role of the depositary	2.93
Other simplifications	2.94
Classification of UCIs According to their Legal Form	2.96
Contractual UCIs	2.96
Criteria determining the nationality of a common fund	2.98
Operating rules of a common fund	2.103
Requirement for an undivided collection of securities forming a common fund	2.103
Internal operation of a common fund	2.109
External operation of a common fund	2.120
Incorporated UCIs	2.129
Legal form of SICAVs (investment companies with variable capital)	2.132
Investment companies with variable capital governed by Part I of the 2002 Act	2.134
Investment companies with variable capital governed by Part II of the 2002 Act	2.135
SICAVs with the status of specialized investment fund	2.143
Legal forms of investment companies with fixed capital	2.148
Investment companies with fixed capital governed by Part I of the 2002 Act	2.150
Investment companies with fixed capital governed by Part II of the 2002 Act	2.152
SICAFs with the status of specialized investment fund	2.158
Other legal forms of UCIs	2.159
Umbrella UCIs	2.166
Principles	2.166
Umbrella FCPs	2.172
Umbrella SICAVs	2.176
Umbrella SICAFs	2.185
<b>3. Permitted Activities for Undertakings for Collective Investment</b>	
Permitted Activities for Coordinated UCITS	3.01
Permitted activities of a coordinated UCITS	3.01
Main activities	3.01
Introduction	3.01

The process	3.06
Transferable securities	3.12
Concept of transferable security	3.12
Eligible transferable securities	3.20
Money market instruments	3.36
Concept of money market instrument	3.36
Eligible money market instruments	3.40
Shares and units in UCIs	3.45
Deposits with credit institutions and incidental cash positions	3.53
Derivatives	3.55
Concept of derivatives	3.55
Eligible financial instruments	3.58
Ancillary activities	3.64
Unlisted transferable securities	3.65
Other money market instruments	3.67
Liquid assets	3.69
Movable and immovable property	3.75
Borrowings	3.77
Underwriting of securities	3.82
Unauthorized activities	3.83
Precious metals	3.83
Uncovered sales of transferable securities	3.84
Loans and guarantees	3.86
Investment limits for coordinated UCIs	3.90
Obligation to pursue a policy based on the principle of risk spreading	3.90
Application of the concept of 'group'	3.93
Separate asset and liability pools within the same issuer	3.101
Investment restrictions applicable by type of instrument	3.103
Transferable securities and money market instruments	3.103
Bank deposits	3.131
Derivatives	3.132
Units in UCIs	3.140
Combined limits per issuer	3.146
Limit of 20 per cent	3.147
Exception of 35 per cent	3.149
Prohibition on pursuing a takeover policy	3.153
Acquisition of shares with voting rights	3.155
Acquisition of other transferable securities	3.158
Exceptions and derogations	3.161
State and supranational issuers	3.161
Investment in intermediaries in a given country	3.163
'Sandwich' subsidiaries	3.164

Tolerated non-compliance with investment restrictions for coordinated UCITS	3.179
Conditions surrounding investment in UCI units	3.183
Conditions surrounding investment in derivatives	3.188
Risk limitation	3.189
Investor information	3.191
Risk management process	3.193
Reporting to the competent authorities	3.195
Permitted Activities for UCIs other than Coordinated UCITS	3.196
Investment objectives of UCIs governed by Part II of the 2002 Act and by the Act of 13 February 2007	3.196
Investment in <i>valeurs</i> (securities)	3.196
Consequences	3.202
Investment and borrowing limitations applicable to UCIs governed by Part II of the 2002 Act or by the Act of 13 February 2007	3.204
General presentation of investment restrictions applicable to UCIs governed by Part II of the 2002 Act or by the Act of 13 February 2007	3.204
Borrowing by UCIs governed by Part II of the 2002 Act	3.219
Principle	3.219
Exceptions	3.220
UCIs using debt for leverage purposes	3.220
UCIs investing mainly in real property	3.221
UCIs pursuing alternative investment strategies	3.222
Specific standards for certain UCIs governed by Part II of the 2002 Act	3.224
Non-coordinated funds of funds	3.224
Investment restrictions	3.224
Other rules	3.231
UCIs investing mainly in risk capital	3.232
Investment restrictions	3.232
Other rules	3.235
UCIs investing mainly in real property	3.240
Investment restrictions	3.240
Other rules	3.245
UCIs pursuing alternative investment strategies	3.253
Concept	3.253
Regulatory framework	3.259
Investment restrictions	3.264
Long portfolios	3.264
Short portfolios	3.280
Borrowing and leverage	3.286

Derivatives	3.288
Cumulative application of restrictions	3.292
Other portfolio management techniques	3.293
Recourse to a prime broker	3.296
Promoter and conducting persons	3.301
Transparency rules	3.302
Use by UCITS of Derivatives and Portfolio Management Techniques	3.303
Introduction	3.303
Recourse to derivatives	3.306
Eligibility criteria	3.310
Tradability	3.311
Composition of underlying assets	3.312
Counterparties	3.325
Valuation and liquidity	3.327
Limits and utilization conditions	3.333
Transparency of underlying assets	3.333
Principle	3.333
Exceptions	3.335
Embedded derivatives	3.341
Concept of global exposure	3.351
Market risk	3.355
Counterparty risk	3.363
Calculation of the global exposure	3.370
Prudential lines of conduct	3.381
Risk measurement system	3.386
Risk limitation rules	3.387
Measurement of market risk	3.389
Measurement of leverage	3.398
Limitation and reduction of counterparty risk	3.401
Issuer risk concentration limits	3.407
Cover for derivatives transactions	3.410
Portfolio management techniques	3.416
Securities lending transactions	3.419
Purchase with option to repurchase transactions ( <i>achat à réméré</i> )	3.420
Sale of securities with a repurchase option ( <i>vente à réméré</i> )	3.422
Reverse repurchase agreement transactions ( <i>opérations de prise en pension</i> )	3.424
Repurchase agreement transactions ( <i>opérations de mise en pension</i> )	3.427
Receipt of an appropriate guarantee/collateral	3.429
Common conditions to securities lending transactions and/or reverse repurchase/repurchase transactions	3.429



Specific conditions applicable to securities tending transactions	3.438
Reinvestment of cash provided as a guarantee	3.439
Other portfolio management techniques	3.440
Use of a subsidiary	3.440
Asset pooling and other income balancing techniques	3.442
Use of risk-management methods	3.443
Aspects of <i>lege ferenda</i>	3.446
<b>4. Establishment of Undertakings for Collective Investment</b>	
The Role of the Promoter	4.01
Definition	4.01
Authorization conditions	4.07
Legal basis for the liability of the promoter of a UCI governed by the 2002 Act	4.10
Practical applications	4.12
Co-promotion of UCIs	4.16
Constitutive Documents and Sales Literature	4.19
Arrangement of constitutive documents and sales literature	4.19
Constitutive documents	4.19
Contractual UCIs	4.19
Management regulations	4.19
Contents of management regulations	4.21
General contents of management regulations	4.22
Specific information about sub-funds	4.49
Corporate UCIs	4.60
Articles of incorporation	4.60
Contents of the articles of incorporation	4.62
SICAVS	4.65
SICAFS	4.83
Umbrella type investment companies	4.92
Sales literature	4.96
Complete prospectus	4.96
Principles	4.96
Minimum information for UCIs governed by the 2002 Act	4.102
Structure for UCIs and, as the case may be, their management company	4.105
Investment policy and restrictions	4.106
Historical performance of UCIs	4.108
Standard investor profile for which a UCI has been developed	4.109
Conducting persons of UCIs	4.110
Units and shares in UCIs	4.112

Liquidation of UCIs	4.116
Financial information	4.117
Information about the depository and the investment advisers	4.120
Tax treatment of UCIs	4.121
Circulation of information	4.122
Risk profile of UCIs	4.123
Umbrella funds	4.124
Simplified prospectus	4.126
Principles	4.126
Contents	4.131
Summary of the UCITS	4.133
Investment information	4.134
Financial information	4.142
Commercial information	4.150
Additional information	4.151
Umbrella funds	4.152
Other publications	4.154
Publication of constitutive documents and sales literature	4.156
Constitutive documents	4.156
Publication	4.156
Effect between the parties	4.158
Validity vis à vis third parties	4.161
Sales literature	4.163
Entry on the List of UCIs	4.172
<b>5. Securities Issued by Undertakings for Collective Investment</b>	
Units and Shares issued by UCIs	5.05
Types and forms of units and shares of UCIs	5.05
Units issued by common funds	5.05
Shares in SICAVs	5.10
Equal value of shares: principles and exceptions	5.13
Form of shares	5.28
Registered shares	5.29
Bearer shares	5.31
Share fractions	5.33
Shares in SICAFs	5.36
SICAFs incorporated in the form of an SA	5.37
SICAFs incorporated in the form of an SCA	5.39
SICAFs incorporated in the form of an SARL	5.42
Rights attaching to the units and shares of UCIs	5.43

## Contents

---

Rights of units in common funds	5.43
General presentation	5.43
Right to information	5.46
Rights of shares in investment companies	5.59
Rights of association	5.61
Right to attend general meetings	5.61
Voting rights	5.62
Principles	5.62
Ordinary shares	5.64
Non-voting shares	5.67
Preferential subscription right	5.78
Right to information	5.89
Right to call a general meeting	5.95
Right to sue for the company's dissolution	5.96
Financial rights	5.97
Right to share in profits	5.97
Principles	5.97
Right to receive dividends	5.100
Right to repayment of capital	5.109
Issue of units or shares of UCIs	5.113
Issue of units by common funds	5.113
Issue of shares by SICAVs	5.123
Issue of shares by SICAFs	5.132
Transfer of units or shares of UCIs	5.138
Restrictions on the assignment of units and shares of UCIs	5.140
Legal restrictions on the assignment of units and shares	5.141
Contractual restrictions on the assignment of units and shares	5.144
Contractual restrictions in common funds	5.144
Restrictions under the articles of incorporation and contractual restrictions in investment companies	5.145
Transfer of units and shares between investors	5.151
Transfer of units in common funds	5.151
Bearer units	5.153
Registered units	5.155
Transfer of shares in investment companies	5.158
Redemption of units and shares issued by UCIs	5.160
Redemption of units issued by FCPs	5.162
Redemption of shares issued by SICAVs	5.171
Redemption of shares at the shareholder's request	5.176
Immediate cancellation of shares	5.177
No immediate cancellation of shares	5.179

Redemption at the initiative of the company with the shareholder's consent	5.190
Compulsory redemption of redeemable shares	5.191
Immediate cancellation of shares	5.193
No immediate cancellation of shares	5.194
Rules applicable to all redemptions by SICAVs	5.198
Redemption of shares by a SICAF	5.206
Principles	5.206
Redemption at the shareholder's request	5.209
Redemption at the company's initiative with the shareholder's consent	5.212
Redemption of redeemable shares	5.213
Founder Shares Issued by UCIs	5.214
Bonds Issued by UCIs	5.225
Principles	5.225
The issue of bonds by UCIs	5.227
Types of bonds that may be issued	5.229
Form of bonds	5.231
Issue of bonds	5.235
Essential rights of bondholders	5.241
Right to interest	5.242
Right to the repayment of principal	5.244
Right to information	5.245
Right to attend general meetings of shareholders	5.246
Additional rights of bondholders	5.248
Right to take certain measures at general meetings	5.249
Right to appoint a representative	5.251
<b>6. Parties Involved in the Operation of Undertakings for Collective Investment</b>	
Conducting Persons of UCIs	6.01
Principles	6.03
Incorporated UCIs	6.04
SAs with a one-tier management structure	6.05
SAs with a two-tier management structure	6.06
SCAs	6.17
SARLS	6.19
Contractual UCIs	6.22
Non-coordinated management company	6.31
Coordinated management company	6.39
Powers and functions of the management bodies and their delegates	6.41

## Contents

---

Management bodies <i>stricto sensu</i>	6.42
Board of directors of an investment company incorporated as an SA with a one-tier management structure	6.42
Legal nature of the functions of the board of directors	6.42
Powers of the board of directors	6.43
Management board of an investment company incorporated as an SA with a two-tier management structure	6.45
Legal nature of the management board's functions	6.45
The management board's powers	6.46
The management company of a common fund	6.48
Legal nature of the management company's functions	6.48
The management company's powers	6.51
Delegates of management bodies	6.56
Delegates of the board of directors or of the management board of an investment company incorporated as an SA	6.57
Global daily management delegation	6.60
Partial delegation of authority	6.66
Delegation by a coordinated investment company to a 'designated' management company	6.69
Delegates of the management company of a common fund	6.82
Status of coordinated management companies	6.83
Permissible activities for coordinated management companies	6.84
Principle function: management of UCIs	6.86
Additional and incidental functions	6.90
Ownership of management companies	6.100
Own funds of management companies	6.106
Head office of management companies	6.120
Head office in company law	6.121
Head office services and prudential supervision	6.126
Status of conducting persons of coordinated management companies	6.131
Organizational requirements	6.155
Rules of conduct	6.165
Delegation of functions by coordinated management companies	6.173
Scope of delegation	6.174
Delegation conditions	6.176
Information	6.177
Control	6.180
Qualification	6.189
Independence	6.191
European passport	6.195
Establishing a branch	6.201

Notification in the home State	6.203
Notification in the host State	6.206
Modification of the organizational structure	6.212
Periodic information requirements	6.214
Right to penalize	6.215
Freedom to provide services	6.223
Liability of management bodies and their delegates	6.230
Liability of the directors, members of the management board, or members of the supervisory board of an investment company incorporated in the form of an SA	6.231
Civil liability of the directors, members of the management board, and members of the supervisory board	6.234
Contractual liability for management faults	6.235
Aggravated liability for infringement of the 1915 Act or of the articles of incorporation	6.245
Quasi-tortious liability under general law provisions	6.248
Criminal liability of the directors, members of the management board, and members of the supervisory board	6.250
Liability of the directors in the event of bankruptcy	6.253
Liability of the management company of a common fund and its directors	6.256
Civil liability of the management company	6.256
Civil liability of a management company's directors	6.266
Criminal liability of a management company's directors	6.268
Liability of the delegates of management bodies	6.269
General delegates	6.269
Special delegates	6.275
Authorization of the conducting persons of UCIs	6.276
History	6.276
Authorization procedure	6.281
Conditions	6.281
Procedure	6.284
The Depositary of a UCI	6.285
Rules governing the depositary's services	6.285
Historical background	6.285
Grand-Ducal Decree of 22 December 1972	6.285
The 1983 Act	6.292
The 1988 and 2002 Acts	6.296
The Act of 13 February 2007	6.298
Conditions of eligibility to act as a depositary	6.299
The legal status of depositaries	6.299
The depositary's infrastructure	6.301

## *Contents*

---

The depositary's independence	6.305
Replacement of a depositary	6.312
Dispensation from the obligation to have a depositary	6.317
Tasks of the depositary	6.319
Custody of a UCI's assets	6.320
The safekeeping of a UCI's assets	6.321
Monitoring of a UCI's assets	6.326
Oversight of a UCI's transactions	6.331
Obligations incumbent on all depositaries of UCIs	6.334
Obligations connected with the issue and redemption of units in UCIs	6.335
Obligations connected with the transactions of UCIs	6.337
Obligations connected with the allocation of a UCI's earnings	6.339
Additional obligations incumbent on the depositary of an FCP	6.342
Obligations connected with calculation of the FCP's net asset value	6.342
Obligations connected with the execution of instructions given by the management company of a common fund	6.344
Day-to-day administration of an FCP's assets	6.347
Civil liability of the depositary	6.349
Rules	6.349
The liability of the depositary as safekeeper	6.349
The liability of the depositary as to its obligation to monitor the assets and check the transactions of a UCI	6.354
Enforcement of a depositary's liability	6.359
Common funds	6.359
Investment companies	6.360
The Head Office Agent of a UCI	6.361
Principles	6.361
Exercise of the main head office functions	6.386
Accounting	6.386
Calculation of the net asset value	6.387
Issue and redemption of units or shares	6.389
Keeping the register of unitholders or shareholders	6.392
Collaborating on the preparation of documents to be sent to investors	6.395
Sending the documents to investors	6.397
Storage of a UCI's essential documents	6.399
Prevention and elimination of late trading	6.401
Prevention and elimination of market timing	6.408
Distributors of Units of UCIs	6.416
Principles	6.416
Conditions common to all distributors	6.421

Conditions applicable to distributors in their capacity as nominees	6.426
Conditions applicable to distributors in their capacity as market makers	6.431
<b>7. Marketing the Units of Undertakings for Collective Investment in the Grand Duchy of Luxembourg</b>	
Marketing the Units of Luxembourg-based UCIs	7.03
General presentation of the Act of 10 July 2005	7.03
Interaction of the Act of 10 July 2005 with the 2002 Act and the Act of 13 February 2007	7.18
Criteria for the application of the two Acts	7.19
Status of the UCI in question: closed-end or other than the closed-end type	7.20
Type of securities concerned: equity securities or other securities	7.28
Type of transactions contemplated: public offering or admission to trading on a regulated market	7.29
Consequences	7.30
Public offering	7.34
Public offering of shares or units in open-end UCIs	7.34
Public offering of transferable securities issued by a UCI of the closed-end type or securities other than shares or units issued by a UCI of the open-end type	7.35
Concept of public offering	7.37
Obligation to draw up a prospectus and exceptions	7.44
Content of prospectus	7.49
Content of registration document	7.51
Content of securities note	7.52
Content of summary	7.54
Special provisions	7.55
Admission to listing and/or trading	7.58
Admission to listing and/or trading on the regulated market of the Luxembourg Stock Exchange	7.58
General principles	7.58
Exceptions	7.63
Act of 11 January 2008	7.70
Admission to the EuroMTF	7.72
Marketing the Units and Other Securities of Foreign UCIs	7.76
Coordinated UCITS	7.77
Freedom of marketing: principles and limits	7.77
Definition of the concept of marketing	7.83
Objective: investment by the public	7.83



Methods: public offering or private placement	7.86
Consequences of defining the concept of marketing	7.87
Notification procedure	7.95
Other UCIs	7.101
Principles	7.101
Concept of public offering under the 2002 Act	7.106
Authorization procedure	7.116
<b>8. Supervision of Undertakings for Collective Investment</b>	
Powers of the CSSF	8.01
Powers of the CSSF during the creation of a UCI	8.02
Powers of the CSSF during the life of a UCI	8.10
Supervision of Luxembourg-based UCIs	8.10
Supervision of foreign UCIs	8.16
Powers of the CSSF during the liquidation of a UCI	8.24
Intermediaries Acting in Support of the CSSF's Supervisory Role	8.25
Intermediaries in Luxembourg-based UCIs	8.25
The two essential intermediaries supporting the CSSF's supervisory role: the depositary and the independent auditor	8.25
Duties of independent auditors of UCIs	8.29
Report on the annual accounts	8.33
Long-form report	8.37
Organization of the UCI	8.41
Supervision of the UCI's transactions	8.51
Internet	8.59
Investor complaints	8.60
Follow-up of problems identified in previous long-form reports	8.61
Opinion of the auditor	8.62
Information for the CSSF	8.63
Status of the independent auditor of UCIs	8.66
Intermediaries in foreign UCIs	8.71
Intermediaries in foreign coordinated UCITS	8.71
Intermediaries in UCIs other than coordinated UCITS	8.72
Supervision of Luxembourg-based UCIs by Foreign Supervisory Authorities	8.73
Collaboration between the CSSF and Foreign Supervisory Authorities	8.78
Cooperation between the CSSF and the supervisory authorities of other Member States of the EEA	8.81

Cooperation with regard to the supervision of UCITS within the meaning of Directive 85/611	8.81
Cooperation with respect to the supervision of UCIs other than UCITS within the meaning of Directive 85/611	8.87
Cooperation between the CSSF and the supervisory authorities of countries outside the EEA	8.88
Cooperation with regard to the supervision of UCITS within the meaning of Directive 85/611	8.88
Cooperation with respect to the supervision of UCIs other than UCITS within the meaning of Directive 85/611	8.91
Treatment of Errors in the Calculation of Net Asset Value and Non-Compliance with Investment Rules	8.92
Definitions and scope of application	8.96
Errors in the calculation of the net asset value	8.96
Non-compliance with investment rules	8.101
Materiality thresholds	8.103
Net asset value calculation error	8.103
Non-compliance with investment rules	8.113
Correction measures	8.119
Correction of errors	8.120
Material calculation error	8.120
Advertent breaches of investment rules	8.126
Regularization of UCIs situation	8.127
Determining the financial impact	8.129
Indemnification	8.140
Applicable principles	8.140
<i>De minimis</i> rule	8.146
Indemnification of nominees	8.150
Umbrella UCIs	8.155
Correction procedures	8.156
General procedure	8.159
Information to be supplied to the promoter and the depositary of the UCI and to the CSSF	8.159
Correction of the error or non-compliance	8.163
Review of the correction process by the independent auditor	8.167
Communications to investors entitled to indemnification	8.173
Simplified procedure	8.175
Fast-track procedure	8.178
Cross-border consequences of Circular 02/77 within the EEA	8.181
Coordinated UCITS	8.182
UCIs other than coordinated UCITS	8.185
Cross-border consequences of Circular 02/77 outside the EEA	8.186

## **9. Dissolution and Restructuring of Undertakings for Collective Investment**

Dissolution and Liquidation of a UCI or of a Sub-fund of a UCI	9.01
Dissolution and Liquidation of a UCI	9.01
Types and causes of dissolution	9.02
Reasons for the dissolution of investment companies	9.03
Dissolution by operation of law	9.03
Voluntary dissolution	9.05
Judicial dissolution	9.10
Reasons for dissolution of common funds	9.21
Dissolution by operation of law	9.21
Voluntary dissolution	9.25
Judicial dissolution	9.27
Regulatory dissolution	9.28
Liquidation regime	9.29
General principles	9.29
Contractual liquidation of UCIs	9.34
Contractual liquidation of investment companies	9.34
Contractual liquidation of common funds	9.46
Judicial liquidation of UCIs	9.56
Liquidation of sub-funds of a UCI	9.68
Straightforward liquidation of sub-funds	9.68
Merger of a sub-fund with another sub-fund of the same UCI	9.78
Merger of sub-funds with other UCIs governed by	
Luxembourg law	9.84
Merger of sub-funds with other UCIs governed by foreign law	9.100
Merger and Demerger of UCIs	9.102
Conversion of UCIs	9.103
Conversion into a SICAV	9.105
Conversion into a SICAF	9.106
Conversion into an FCP	9.112

## **10. Undertakings for Collective Investment and Criminal Law**

UCIs and the Combating of Money Laundering and Terrorist Financing	10.02
Outline of the Luxembourg regulations in the combating of money laundering and terrorist financing	10.09
Prevention: professional obligations	10.09
Professionals concerned	10.10
Professional obligations	10.18

Obligation to identify clients	10.21
General rules	10.21
Special rules for UCIs that do not market their own units or shares	10.46
Obligation to pay special attention to certain transactions	10.54
Obligation to have an appropriate internal organization	10.58
Obligation to report money laundering	10.59
Penalties: money laundering and terrorist financing offences	10.61
Offence of money laundering	10.61
Offence of terrorist financing	10.64
Breach of professional obligations	10.65
Penalties	10.66
Difficulties concerning the application of the special rules applicable to UCIs	10.69
<b>UCIs and Professional Banking Secrecy</b>	<b>10.73</b>
Scope of the application of professional and banking secrecy	10.73
History of professional and banking secrecy	10.78
Lifting of banking secrecy	10.81
Lifting of banking secrecy in cases covered by the 1993 Act	10.83
Disclosure authorized or imposed by or further to a legislative provision	10.84
Disclosure within the framework of prudential supervision	10.88
Intra-group disclosure	10.91
Disclosure to certain professionals of the financial sector	10.94
Lifting of banking secrecy in cases not covered by the 1993 Act	10.96
Interests protected by banking secrecy	10.98
Principle of proportionality	10.101
Lifting of bank secrecy in the client's interest	10.106
Lifting of bank secrecy in the interest of the custodian of the secret	10.116

## **11. Undertakings for Collective Investment and Tax Law**

Tax Treatment of UCIs	11.01
History of the tax treatment of UCIs	11.01
Origins	11.01
General discussion of capital duty and subscription tax	11.02
Treatment of UCIs	11.06
Capital duty	11.07
Subscription tax	11.08
The 1983 Act	11.12
The 1988 Act	11.15

## Contents

---

The 2002 Act	11.16
The Act of 13 February 2007	11.17
Features of the tax regime for UCIs	11.18
Principle	11.18
Scope	11.20
Limits	11.22
Value added tax	11.25
General	11.25
Status of participants in UCIs with regard to VAT	11.32
Exemption from VAT of services related to the management of UCIs	11.35
Other services	11.44
Aspects of territoriality	11.45
Examples	11.48
Registration duty	11.49
Property tax	11.50
Tax treatment of UCIs on their formation	11.55
Incorporated UCIs	11.55
Contractual UCIs	11.57
Ongoing tax treatment of UCIs	11.58
Application of subscription tax	11.58
Subscription tax rate	11.60
Normal rules	11.60
Preferential regimes	11.61
Funds of funds	11.61
Money market funds	11.63
Sub-funds and classes of units in UCIs reserved for institutional investors	11.70
Pension fund pooling vehicles	11.72
Basis of assessment for subscription tax	11.82
Tax treatment of UCIs on dissolution or restructuring	11.83
Tax rules for management companies of UCIs	11.86
General	11.87
Tax status proper	11.92
Management company with reduced activity	11.92
Management company with extended activity	11.94
Legal and tax rules for advisory companies	11.96
Concept	11.97
Permitted sphere of activities	11.100
Tax status	11.102
Changes to the tax rules	11.103
Eligibility of UCIs to Benefit from Double Taxation Treaties	11.106

Conditions under which Luxembourg-based UCIs are eligible to benefit from tax treaties	11.108
Concepts of person and residence as applied in the tax treaties	11.110
Contractual UCIs	11.110
Incorporated UCIs	11.114
Clauses excluding Luxembourg-based UCIs from the benefit of double taxation treaties	11.116
‘Subject to tax’ clause	11.117
Clause excluding holding companies	11.118
Clause excluding incorporated UCIs	11.121
Practice of Luxembourg’s tax administration	11.122
Conditions determining the eligibility of foreign UCIs to benefit from tax treaties	11.126
Taxation of Participants in Luxembourg-based UCIs	11.128
Situation of non-resident investors in Luxembourg	11.129
Taxation of Luxembourg residents	11.132
Principles	11.132
UCIs governed by the Rau Act	11.137
History	11.137
Provisions of the Rau Act	11.139
Gradual repeal of the Rau Act	11.146
Sale and redemption of units in Luxembourg-based UCIs	11.148
Application of tax treaties to investors in Luxembourg-based UCIs	11.157
Tax Supervision of UCIs	11.160
Impact on UCIs of the European Directive on the Taxation of Savings Income	11.165
Presentation of Directive (EC) 2003/48	11.165
A necessary normative instrument	11.165
Formal adoption of a method: harmonization by exchange of information	11.169
Key players in the new systems	11.173
The paying agent	11.174
The beneficial owner	11.179
Type of information exchanged	11.182
A system limited to savings income in the form of interest payments	11.184
Transposition of the Directive into Luxembourg law	11.187
Accurate transposition by the Act of 21 June 2005	11.187
Benefit of transitional provisions	11.189
Introduction of withholding tax and revenue sharing	11.191
Withholding mechanism	11.191

Revenue sharing procedure	11.196
Differing treatment of UCIs under the law	11.198
Criteria to determine UCIs whose revenues or distributions may be taxed	11.200
UCIs and revenues falling within the scope of the Act	11.202
UCIs and distributions outside the scope of the Act	11.206
Consequences for the operational environment of UCIs	11.207
<b>12. Undertakings for Collective Investment and European Law</b>	
Applicable Community Standards	12.13
Free movement of capital	12.13
Freedom to provide services	12.26
The right of establishment	12.33
The principle of close cooperation	12.39
Consequences of Community Law for UCIs	12.44
Compatibility of Directive 85/611 with the Treaty of the European Communities	12.44
Marketing coordinated UCITS in the EEA	12.57
Marketing other UCIs in the EEA	12.68
Communication between supervisory authorities	12.71
Implementing powers of the Commission of the European Communities as regards UCIs	12.75
Principles	12.75
Scope of implementing powers	12.83
Review and outlook	12.100
<b>13. Risk Capital Investment Companies</b>	
Legal Framework	13.01
Origin	13.01
Legal and regulatory status	13.13
Organization	13.17
Basic features	13.17
Object	13.17
Investment activity	13.18
Investment in risk capital	13.20
General	13.20
Variants of risk capital	13.28
Private equity real estate	13.47
Exclusion of risk capital	13.49
Other aspects	13.52

No obligation to spread risks	13.59
Eligible investors	13.60
Intentional adoption of SICAR status	13.70
Structure and operation	13.71
Company law aspects	13.71
Legal forms	13.71
Share capital	13.77
Variability	13.77
Minimum capital	13.86
Legal reserve	13.87
Distributions and repayments to investors	13.91
Securities	13.95
Securities that may be issued	13.95
Issue of securities	13.97
Umbrella SICARs	13.104
Regulatory aspects	13.105
Supervision by the CSSF	13.105
Initial authorization	13.106
Permanent supervision	13.108
Status of conducting persons and promoter	13.111
Correspondents of the CSSF	13.117
Depositary	13.117
External auditor	13.122
Head office	13.126
Information for investors	13.129
Prospectus and annual report	13.129
Other information	13.136
Valuation of assets	13.138
Investment restrictions	13.144
Provisions under criminal law	13.145
Liquidation	13.146
Taxation	13.147
General	13.147
Direct taxes	13.147
SICARs organized in the form of a corporation	13.153
Corporate income tax and municipal business tax	13.153
Wealth tax	13.163
Fiscally transparent SICARs	13.164
Income tax and wealth tax	13.164
Municipal business tax	13.167
Withholding tax	13.168
Income received by the SICAR	13.168



## *Contents*

---

Income distributed by the SICAR	13.172
Indirect taxes	13.175
Capital duty	13.175
Value added tax	13.177
Tax regime for resident investors in SICARs incorporated in the form of a corporation	13.184
Natural persons	13.184
Corporations	13.188
Change of company form	13.192
Conversion of an ordinary company into a SICAR	13.192
Conversion of a SICAR into an ordinary company	13.194
The SICAR and the international tax environment	13.195
SICARs and double tax treaties	13.195
SICARs and the Directive on parent companies and subsidiaries	13.198
<b>14. Securitization Vehicles</b>	
Introduction	14.01
Scope of Application	14.11
Securitization Vehicles	14.21
Authorization and Supervision	14.24
Particular Provisions on the Assignment of Receivables	14.32
Subordination and Protection against Bankruptcy	14.35
Fiduciary Representative	14.37
Tax Treatment	14.40
Securitization and UCIs/SICARs	14.47
Objectives	14.51
Redemption	14.56
Management of underlying assets	14.59
Permanent investment	14.64
<i>Select Bibliography</i>	597
<i>Index</i>	605

<http://www.pbookshop.com>

## TABLE OF CASES

39/75 Coenen [1975] ECR 1547 . . . . .	12.30
286/82 and 26/83 Luisi and Carbone [1984] ECR 377 . . . . .	12.13
14/83 von Colson and Kamann [1984] ECR 1909 . . . . .	12.42
152/84 Marshall [1986] ECR 749 . . . . .	12.42
205/84 Commission v Germany [1986] ECR 3802 . . . . .	12.25, 12.29
31/87 Beentjes [1988] ECR 4662 . . . . .	12.42
235/87 Matteucci [1988] ECR I-5611 . . . . .	12.43
125/88 Nijman [1989] ECR 3546 . . . . .	12.42
C-340/89 Vlassopoulou [1991] ECR I-2357 . . . . .	12.36
C-76/90 Säger [1991] ECR I-4222 . . . . .	12.28
C-106/91 Ramrath v Luxembourg Minister of Justice [1992] ECR I-3351 . . . . .	12.36
C-19/92 Kraus Dieter v Land Baden Württemberg [1993] ECR I-1689 . . . . .	12.36
C-91/92 Faccini Dori [1994] ECR I, 3355-3356 . . . . .	12.42
C-55/93 van Schaik [1994] ECR I-4858 . . . . .	12.53
C-358/93 and C-416-93 Bordessa [1995] ECR I-361 . . . . .	12.23
C-384/93 Alpine Investments . . . . .	12.29
C-433/93 Commission v Germany [1995] ECR I-2317 . . . . .	12.41
C-5/94 Gebhard [1995] ECR I-4165 . . . . .	12.36
C-101/94 Commission v Italy [1996] ECR I-2691 . . . . .	12.32
C-192/94 El Corte Inglés [1996] ECR I-1303 . . . . .	12.42
C-303/94 European Parliament v Council [1996] ECR I-2971 . . . . .	12.95
C-57/95 France v Commission [1997] ECR I-1650-1651 . . . . .	12.94
C-96/95 Commission v Germany [1997] ECR I-1679 . . . . .	12.41
C-114/97 Commission v Spain [1998] ECR I-6718 . . . . .	12.30
C-191/97 Deliège [2000] ECR I-2620 . . . . .	12.55
C-222/97 Trummer and Mayer [1999] ECR I-1661 . . . . .	12.15, 12.22
C-302/97 Konle [1999] ECR I-3099 . . . . .	12.22
C-54/99 Church of Scientology [2000] ECR I-1335 . . . . .	12.24, 12.48
C-442/02 CaixaBank France [2004] ECR I-8961 . . . . .	12.37
C-8/03, Banque Bruxelles Lambert SA (BBL) v Etat belge, 21 October 2004, ECJ . . . . .	11.32
C-266/03 Commission/Luxembourg . . . . .	12.43
C-169/04, Abbey National plc, Inscape Investment Fund v Commissioners of Customs & Excise, 4 May 2006 ECJ . . . . .	11.36, 11.38, 12.09, 13.179

<http://www.pbookshop.com>

## TABLES OF LEGISLATION, TREATIES, AND CONVENTIONS

European and International Legislation	xliv
1872 Act (25 January 1872) . . . . .	11.04
1913 Act (23 December 1913) . . . . .	11.04
1915 Act (10 August 1915) . . . . .	1.23, 1.75, 4.62
Art 6 . . . . .	13.79
Art 11 . . . . .	9.43, 13.79
Art 14 . . . . .	2.154
Art 21 . . . . .	2.156
Art 23(2) . . . . .	2.142
Art 26 . . . . .	2.139, 9.91, 9.108
Art 26(1) . . . . .	13.101
Art 27(7) . . . . .	5.38
Art 27(11) . . . . .	5.223
Art 31(1) . . . . .	9.108
Art 32 . . . . .	4.84, 4.88, 5.78, 5.82–5.85, 5.90, 5.132, 5.222, 5.229
Art 33 . . . . .	4.88
Art 37 . . . . .	2.177, 5.13, 5.28, 5.33, 5.220, 5.222
Art 39 . . . . .	5.29, 5.90, 6.393
Art 40 . . . . .	5.29, 5.163, 6.392
Art 41 . . . . .	5.31, 5.38
Art 42 . . . . .	5.154, 5.163
Art 44 . . . . .	5.70
Art 45 . . . . .	5.69
Art 46 . . . . .	5.73, 5.77
Art 47 . . . . .	5.76, 5.90
Art 49 . . . . .	5.65, 5.174, 5.187–5.194, 5.209
Art 50 . . . . .	6.42
Art 51 . . . . .	6.05, 6.146
Art 53 . . . . .	6.05, 6.11, 6.43
Art 57 . . . . .	5.90, 6.11
Art 59 . . . . .	6.11, 6.234, 6.245
Art 60 . . . . .	5.90, 6.07–6.15, 6.44, 6.60, 6.64, 6.234, 6.245, 6.269
Art 67 . . . . .	5.247, 9.60, 9.108
Art 67(4) . . . . .	5.62, 5.64
Art 69 . . . . .	5.219
Art 70 . . . . .	5.95
Art 72 . . . . .	5.103
Art 74 . . . . .	5.90, 6.243
Arts 79–98 . . . . .	5.226
Art 85 . . . . .	5.245
Art 88 . . . . .	5.251
Art 94 . . . . .	5.229, 5.252
Art 95 . . . . .	5.226
Art 96 . . . . .	5.229
Art 99 . . . . .	9.05, 9.17
Art 100 . . . . .	9.09
Art 101(3) . . . . .	9.19
Art 102 . . . . .	6.18
Art 103 . . . . .	2.144, 2.177, 5.40, 5.62, 5.64, 5.78, 5.90, 5.95, 5.103, 5.132, 5.226, 6.21, 6.392, 9.05, 9.09, 9.19, 9.91, 9.108
Art 106 . . . . .	5.40
Art 107 . . . . .	6.17
Art 111 . . . . .	6.18
Art 113 . . . . .	2.155
Art 114(2) . . . . .	14.21
Art 142 . . . . .	9.05
Art 145 . . . . .	9.38
Art 148 . . . . .	9.60
Art 149 . . . . .	9.42
Art 150 . . . . .	9.39
Art 151 . . . . .	9.40
Art 157 . . . . .	9.41, 9.42
Art 159(1) . . . . .	6.124
Art 162 . . . . .	2.123
Art 163 . . . . .	6.251
Art 169 . . . . .	6.251
Art 173 . . . . .	6.251
Art 180 . . . . .	9.05, 9.18
Art 181 . . . . .	2.146, 9.05
Art 182 . . . . .	2.177
Art 185 . . . . .	6.392
Art 188 . . . . .	5.42, 6.392, 14.21
Arts 188–190 . . . . .	2.146
Art 189 . . . . .	9.20
Art 190 . . . . .	5.159
Art 191 . . . . .	6.19, 6.21

*Tables of Legislation, Treaties, and Conventions*

Art 195 . . . . .	5.62, 5.64	1979 (12 February 1979) . . . . .	11.25
Art 198 . . . . .	5.93	Art 4(1) . . . . .	11.26
Art 199 . . . . .	5.132, 9.05	Art 17 . . . . .	11.28, 11.29, 11.46
Art 203 . . . . .	9.18	Art 18(2) . . . . .	11.33
Arts 257–308 . . . . .	9.102	Art 43 . . . . .	11.27
Art 264 . . . . .	5.90	Art 44 . . . . .	11.27
Art 267 . . . . .	5.90	Art 49(2) . . . . .	11.27
Art 277 . . . . .	5.90	1981 Act (23 April 1981) . . . . .	
Art 278 . . . . .	5.90, 9.44	Art 16(1) . . . . .	10.79
Art 281 . . . . .	5.90	1982 Act (11 August 1982) . . . . .	6.406
Art 292 . . . . .	5.90	1983 Act (20 May 1983) . . . . .	1.29, 6.24,
Art 295 . . . . .	5.90		9.51, 11.01, 11.12
Art 306 . . . . .	5.90	Art 2(1) . . . . .	6.23
Art 307 . . . . .	5.90	Art 2(2) . . . . .	6.293, 11.87
Art 308 . . . . .	5.90, 9.95, 9.99	Art 7(4) . . . . .	3.89
1920 Act (7 August 1920) . . . . .	11.05	Art 7(5) . . . . .	3.87
1929 Act (31 July 1929) . . . . .	1.23, 6.23,	Art 13(1) . . . . .	6.292
	11.01, 11.12, 11.100, 11.120	Art 30 . . . . .	1.31
Art 1 . . . . .	11.102, 11.162	Art 42(1) . . . . .	4.178
1967 Act (4 December 1967) (LIR) . . . . .		Art 66 . . . . .	11.160
Art 14(1) . . . . .	13.165	1984 Act (27 April 1984 ‘Rau’ Act) . . . . .	
Art 23 . . . . .	13.157		11.137–11.146
Art 40 . . . . .	13.157	1984 Act (28 June 1984) . . . . .	10.67
Art 97 . . . . .	13.184	Art 7 . . . . .	8.67
Art 97(3) . . . . .	11.153	Art 9 . . . . .	8.68, 10.10
Art 99 . . . . .	11.133, 11.148, 13.185	1988 Act (30 March 1988) . . . . .	1.37, 1.43,
Arts 99–101 . . . . .	13.187		1.70, 2.57, 11.15, 11.53, 11.95
Art 100 . . . . .	11.133, 11.150	Art 1(5) . . . . .	2.83
Art 102(6) . . . . .	13.187	Art 6(2) . . . . .	11.87
Art 112 . . . . .	2.160	Art 33 . . . . .	6.318
Art 129 . . . . .	11.139, 11.145	Art 39 . . . . .	6.318
Art 130(4) . . . . .	13.187	Art 41(1) . . . . .	3.309
Art 131(1) . . . . .	13.187	Art 61 . . . . .	11.87
Art 132 . . . . .	11.150	Art 65 . . . . .	6.318
Art 146(1) . . . . .	13.168	Art 69 . . . . .	6.318
Art 147(2) . . . . .	13.169	Art 76(2) . . . . .	8.87
Art 154 . . . . .	13.170	Art 80 . . . . .	9.51
Art 156(8) . . . . .	11.129, 13.173	Art 108 . . . . .	1.39, 1.41
Art 159 . . . . .	13.150	Art 108(3) . . . . .	1.44
Art 164 . . . . .	13.160	Art 111 . . . . .	4.49
Art 166 . . . . .	13.159, 13.189	1989 Act (7 July 1989) . . . . .	10.61, 10.66
Art 167(1) . . . . .	4.49	1990 Act (6 December 1990) . . . . .	11.133
Art 169 . . . . .	13.193	1991 Act (19 July 1991) . . . . .	1.45, 2.57, 2.58
1971 Act (29 December 1971) . . . . .	11.04	1992 Act (17 March 1992) . . . . .	10.62
Art 1 . . . . .	11.57	1992 Act (4 December 1992) . . . . .	6.101
1973 Act (19 February 1973) . . . . .	10.61, 10.66	Art 7 . . . . .	6.101
Art 8 . . . . .	10.66	1993 Act (5 April 1993) . . . . .	8.78
1976 Act (9 December 1976) . . . . .	10.67	Art 7(2) . . . . .	6.149
Art 12 . . . . .	10.10	Art 13(2) . . . . .	10.75
1977 Act (20 April 1977) . . . . .	10.67	Art 14(1) . . . . .	1.91
Art 13 . . . . .	10.10	Arts 15–22 . . . . .	1.92
1977 Act (12 July 1977) . . . . .		Art 23 . . . . .	1.93
Art 2 . . . . .	11.162	Art 23(4) . . . . .	1.92

*Tables of Legislation, Treaties, and Conventions*

Art 24.....	6.417	Art 12.....	5.167–5.173
Art 28.....	1.92, 2.162	Art 12(3).....	5.120
Art 29.....	6.36, 6.369, 6.370, 13.127	Art 13(1).....	4.19, 4.51, 4.156, 5.44
Art 36.....	6.369	Art 13(2).....	4.22–4.26, 4.52, 5.113
Art 39.....	10.20	Art 13(2) ..	2.109, 2.128, 4.21, 4.29–4.32
Arts 39–41.....	6.369	Art 14.....	6.51
Art 41.....	6.371, 10.75, 10.90	Art 14(1).....	2.112, 9.22
Art 41(2).....	10.84	Art 14(2).....	6.265
Art 41(3).....	10.88	Art 15.....	2.117, 6.256
Art 41(6).....	10.83	Art 16.....	2.93, 5.166, 6.358
Art 44.....	10.88	Art 17.....	6.300, 6.358
Art 51.....	10.90	Art 17(1).....	6.297
1993 Act (22 December 1993).....	11.138	Art 18(2).....	2.93, 5.164, 6.53, 6.297, 6.332
1994 Act (23 December 1994).....	1.38	Art 19(2).....	13.121
Art 12.....	1.38	Art 20.....	6.192
1996 Act (24 December 1996).....	1.40, 11.61	Art 21.....	6.25, 6.313–6.316
Art 5.....	1.40	Art 22(1).....	4.178, 9.21, 9.23
1998 Act (11 August 1998).....	10.10, 10.63, 10.67	Art 22(3).....	5.120
1998 Act (23 December 1998).....		Art 23.....	4.178, 13.86
Art 2.....	1.77, 10.15	Art 24.....	5.166, 9.28
Art 3.....	1.77	Art 25.....	4.67, 11.154
Art 16.....	8.68	Art 26.....	1.75, 2.150, 4.65, 5.10, 5.14
1999 Act (29 April 1999).....	1.42, 8.64, 8.87	Art 27.....	1.70, 1.84, 6.79, 6.80, 6.308, 6.310, 6.364
2000 Act (17 July 2000).....	1.43, 1.70	Art 27(1).....	13.86
2001 Act (1 August 2001).....		Art 28.....	4.76–4.80, 5.31, 5.130–5.139, 5.200–5.204
Art 5.....	6.352	Art 28(1).....	4.68, 5.109
Art 11.....	6.322, 6.349	Art 28(2).....	4.75, 5.126
Art 13.....	6.352, 6.353	Art 28(8).....	5.30, 5.183, 13.101
2001 Act (21 December 2001).....	1.44, 11.138	Art 29.....	4.67
Art 10.....	1.44	Art 29(2).....	5.177
2002 Act (2 August 2002).....	6.406	Art 29(3).....	5.80, 5.125
2002 Act (20 December 2002).....	1.01, 1.07, 1.11, 1.36, 1.45, 1.57, 1.63, 1.75, 11.16, 13.09	Art 30.....	9.07
Art 1.....	3.26, 11.64	Art 31.....	4.80, 5.216, 13.95
Art 1(18).....	3.37, 3.67	Art 32.....	4.72
Art 2.....	2.09	Art 32(1).....	5.107
Art 2(1).....	2.02	Art 32(2).....	13.87
Art 2(2) ..	1.02, 2.32, 2.34, 2.161, 5.160	Art 32(3).....	5.108
Art 2(5).....	9.87	Art 33.....	2.93
Art 3.....	2.17, 2.22, 2.35, 3.263	Art 34(1).....	6.297
Art 4.....	2.98, 6.362, 11.18	Art 34(2).....	6.358
Art 5.....	2.96, 2.126, 5.05	Art 34(3).....	2.93, 5.130, 5.205, 6.297, 6.332
Art 8.....	5.157, 6.392	Art 35(2).....	6.300
Art 8(1).....	2.119, 5.05, 5.07	Art 36.....	13.121
Art 9(1).....	4.34, 5.114	Art 39.....	2.150
Art 9(2).....	5.116	Art 40.....	1.70, 1.75, 2.151, 5.109, 5.135–5.137, 5.207, 5.216, 6.297, 6.300, 6.308, 6.332, 6.358, 9.07, 13.95, 13.121
Art 9(3).....	4.45		
Art 11(1).....	2.116, 5.06, 5.44		
Art 11(2).....	5.162		
Art 11(3).....	5.164		

*Tables of Legislation, Treaties, and Conventions*

Art 40(2) . . . . .	2.93	Art 65(1) . . . . .	1.02, 2.96, 2.126, 2.161, 5.05
Art 41 . . . . .	2.09	Art 66 . . . . .	2.109, 2.112, 2.116, 2.117, 2.119, 2.128, 4.19, 4.29–4.34, 4.45, 4.51, 4.52, 4.156, 4.178, 5.05–5.07, 5.44, 5.113, 5.120, 5.157, 5.166, 6.25, 6.51, 6.162, 6.192, 6.256, 6.265, 6.297, 6.300, 6.332, 6.358, 6.392, 9.21, 9.23, 9.28, 13.121
Art 41(1) . . . . .	2.46, 2.96, 3.01, 3.26, 3.30, 3.33, 3.36–3.53, 3.306, 3.311, 3.327, 3.429	Art 67 . . . . .	1.68, 3.204
Art 41(2) . . . . .	3.66, 3.67, 3.75, 3.83, 3.147	Art 69 . . . . .	1.02, 2.135, 3.196, 4.67, 11.154
Art 41(2)(a) . . . . .	3.145	Art 70 . . . . .	13.86
Art 41(3) . . . . .	3.69	Art 71 . . . . .	1.75, 2.135, 4.67, 4.72–4.80, 5.10, 5.14, 5.30, 5.80, 5.107, 5.126, 5.183, 5.200–5.204, 5.216, 6.297, 6.300, 6.332, 6.358, 9.07, 13.95, 13.101, 13.121
Art 42(1) . . . . .	3.194, 3.386, 3.443	Art 72 . . . . .	1.68
Art 42(2) . . . . .	3.177, 3.309, 3.314, 3.416	Art 72(1) . . . . .	3.204
Art 42(3) . . . . .	3.135, 3.189, 3.333, 3.335, 3.340, 3.351, 3.355, 3.387, 3.407	Art 73 . . . . .	1.02, 2.152, 2.159, 2.161, 3.196
Art 43 . . . . .	3.180, 3.340	Art 74(1) . . . . .	13.86
Art 43(1) . . . . .	3.103, 3.108, 3.133, 3.334, 3.368	Art 74(2) . . . . .	9.07
Art 43(2) . . . . .	3.104, 3.106, 3.108, 3.338, 3.368	Art 75 . . . . .	1.68, 5.137, 6.297, 6.332, 6.358
Art 43(3) . . . . .	3.111	Art 76 . . . . .	1.64, 1.89, 3.227, 3.274, 7.102, 7.118, 8.19
Art 43(4) . . . . .	3.109	Art 77 . . . . .	6.40, 11.89
Art 43(5) . . . . .	3.107, 3.108, 3.150, 3.369	Art 77(1) . . . . .	1.91, 6.22
Arts 43–45 . . . . .	3.134	Art 77(2) . . . . .	6.29, 6.39
Art 44 . . . . .	3.120, 3.121, 3.180	Art 77(3) . . . . .	6.90, 11.90
Art 44(1) . . . . .	3.118, 3.121, 3.337, 3.368	Art 77(4) . . . . .	6.118, 6.157, 6.166
Art 45 . . . . .	3.115–3.117, 3.152, 3.180	Arts 77–80 . . . . .	1.92
Art 45(1) . . . . .	1.83, 3.112, 8.06	Arts 77–92 . . . . .	1.77
Art 46 . . . . .	3.141, 3.180, 3.340	Art 78(1) . . . . .	6.106, 6.116, 6.131, 6.138
Art 46(1) . . . . .	3.92, 3.162	Art 78(2) . . . . .	6.104
Art 46(2) . . . . .	3.144	Art 78(5) . . . . .	1.93
Art 46(3) . . . . .	3.184, 5.187	Art 79(1) . . . . .	6.100
Art 47 . . . . .	3.191	Art 80 . . . . .	1.92
Art 47(2) . . . . .	3.187, 3.192	Art 82 . . . . .	1.93
Art 48 . . . . .	3.163	Art 82(1) . . . . .	6.113, 6.119
Art 48(1) . . . . .	3.155	Art 84(1) . . . . .	6.156
Art 48(2) . . . . .	3.158	Art 84(2) . . . . .	6.98
Art 49 . . . . .	8.128	Art 85(1) . . . . .	6.129, 6.158, 6.175, 6.177, 6.192, 6.308, 6.310
Art 49(1) . . . . .	3.181	Art 86 . . . . .	6.165
Art 49(2) . . . . .	3.34, 3.99, 8.102	Art 88 . . . . .	6.201, 6.203, 6.211, 6.212
Art 49(3) . . . . .	3.92, 3.102	Art 88(4) . . . . .	6.170, 6.210
Art 50(2) . . . . .	3.77	Art 89 . . . . .	6.223
Art 51(1) . . . . .	3.86	Art 89(3) . . . . .	6.170
Art 51(2) . . . . .	3.87	Art 90 . . . . .	11.89
Art 52 . . . . .	3.84, 3.410	Art 91 . . . . .	1.92, 6.283, 11.89
Art 52(2) . . . . .	8.27		
Art 55 . . . . .	8.74, 8.75		
Art 56 . . . . .	3.97, 4.127		
Art 58 . . . . .	1.87, 7.92, 7.99, 8.17		
Art 59 . . . . .	7.98, 7.118, 8.17		
Art 60 . . . . .	1.88, 7.95, 7.100		
Art 61 . . . . .	7.98, 8.17		
Art 64 . . . . .	2.98, 6.362, 11.18		
Art 65 . . . . .	3.196, 5.164		



*Tables of Legislation, Treaties, and Conventions*

Art 91(1) . . . . .	1.91, 6.22, 6.29	Art 116(2) . . . . .	13.136
Art 91(5) . . . . .	1.93, 6.28	Art 117 . . . . .	4.154, 5.58
Art 92 . . . . .	1.92, 11.89	Art 118 . . . . .	8.08, 8.13, 8.14
Art 93(1) . . . . .	7.34, 7.116, 7.119, 8.02, 8.19	Arts 120–126 . . . . .	6.252
Art 93(2) . . . . .	6.301, 8.08, 8.19	Art 127(1) . . . . .	11.55, 13.153
Art 93(3) . . . . .	1.95, 2.90, 4.04, 6.131, 6.284, 7.117, 11.97, 13.112	Art 127(2) . . . . .	11.83, 11.128
Art 94(1) . . . . .	4.177, 4.179, 7.34, 8.02	Art 128 . . . . .	11.56, 11.84
Art 94(2) . . . . .	4.179, 6.316	Art 128(1) . . . . .	11.55, 13.176
Art 96 . . . . .	4.163, 4.174	Art 129(1) . . . . .	11.60
Art 98 . . . . .	8.82, 8.87–8.90	Art 129(2) . . . . .	11.60, 11.63
Art 98(1) . . . . .	8.68	Art 129(3) . . . . .	1.44, 11.61, 11.68, 11.72
Art 98(4) . . . . .	8.81, 8.85	Art 129(5) . . . . .	11.82
Art 99(3) . . . . .	9.27	Art 131 . . . . .	11.160, 11.164
Art 100(1) . . . . .	8.18	Art 132(1) . . . . .	9.105
Art 100(2) . . . . .	8.84	Art 132(2) . . . . .	9.105
Art 103 . . . . .	8.83	Art 133(4) . . . . .	4.49, 4.95
Art 104 . . . . .	8.24, 9.63–9.66	Art 133(5) . . . . .	2.170, 2.180, 4.59, 4.125
Art 104(1) . . . . .	6.316, 9.11, 9.27	Art 188 . . . . .	13.96
Art 104(2) . . . . .	9.50	Annex I . . . . .	13.133
Art 104(3) . . . . .	9.51	2003 Act (2 August 2003) . . . . .	1.07
Art 104(5) . . . . .	9.38, 9.55, 9.61, 9.102	2003 Act (19 December 2003) . . . . .	1.61
Art 104(8) . . . . .	9.53	Art 12 . . . . .	1.44, 1.61
Art 104(10) . . . . .	9.53	2004 Act (22 March 2004) . . . . .	3.211, 14.03
Art 104(11) . . . . .	9.11, 9.27	Art 1(1) . . . . .	14.12
Art 105(1) . . . . .	8.24, 9.31	Art 1(2) . . . . .	14.03
Art 106(1) . . . . .	8.24, 9.36, 9.47	Art 4 . . . . .	14.57
Art 106(2) . . . . .	9.36, 9.48	Art 4(1) . . . . .	14.21
Art 107 . . . . .	9.33	Art 5 . . . . .	14.23
Art 108(1) . . . . .	8.15, 8.23	Art 6(1) . . . . .	14.22
Art 109 . . . . .	2.128, 5.52, 5.53, 7.118	Art 6(2) . . . . .	14.22
Art 109(2) . . . . .	8.27, 13.134	Art 8 . . . . .	14.23
Art 109(3) . . . . .	4.127, 5.49	Art 19 . . . . .	14.24
Art 110(1) . . . . .	4.96, 4.123, 5.48, 6.236	Art 48 . . . . .	14.29
Art 110(2) . . . . .	13.133	Art 50 . . . . .	14.44
Art 110(3) . . . . .	4.127	Art 52(3) . . . . .	11.35, 14.45
Art 110(4) . . . . .	13.133	Art 53 . . . . .	14.14
Art 110(5) . . . . .	8.33	Art 54 . . . . .	14.61, 14.64
Art 110(7) . . . . .	4.103	Art 55(1) . . . . .	14.32
Art 111(1) . . . . .	4.97	Art 56(2) . . . . .	14.33
Art 111(2) . . . . .	4.97	Art 58 . . . . .	14.32
Art 112 . . . . .	4.100, 4.129, 5.48, 13.132	Art 60 . . . . .	14.34
Art 113(1) . . . . .	8.34	Art 61 . . . . .	14.47
Art 113(2) . . . . .	8.27, 8.67	Art 61(1) . . . . .	14.61
Art 113(3) . . . . .	8.14, 8.34, 8.63, 8.70	Art 63 . . . . .	14.23, 14.35
Art 113(4) . . . . .	8.66	Art 64 . . . . .	14.35
Art 113(5) . . . . .	9.35, 9.40	Art 64(2) . . . . .	14.36
Art 113(6) . . . . .	8.72	Arts 67–69 . . . . .	14.38
Art 114 . . . . .	8.08, 8.36	Art 71 . . . . .	14.38
Art 114(2) . . . . .	4.165	Art 72 . . . . .	14.38
Art 115(1) . . . . .	4.164, 5.50, 5.55	Art 86 . . . . .	14.37
Art 116 . . . . .	1.83, 4.80, 5.57, 8.55	Art 89 . . . . .	14.42, 14.46
Art 116(1) . . . . .	8.06, 13.136	Art 90 . . . . .	14.42

*Tables of Legislation, Treaties, and Conventions*

2004 Act (15 June 2004) . . . . .	1.62, 3.234, 13.21	Art 2 . . . . .	7.38, 7.45
Art 1(1) . . . . .	13.15, 13.60, 13.71	Art 8 . . . . .	7.49, 7.50, 7.54
Art 1(2) . . . . .	13.20, 13.41, 13.48	Art 10 . . . . .	7.56
Art 2 . . . . .	13.61, 13.64	Art 18 . . . . .	7.17, 7.104
Art 3 . . . . .	13.75	Art 19 . . . . .	7.17
Art 4(1) . . . . .	13.86	Art 68(1) . . . . .	4.49
Art 4(2) . . . . .	13.77, 13.89	2006 Act (31 July 2006) . . . . .	6.274
Art 5(1) . . . . .	13.90, 13.97	2006 Act (22 December 2006) . . . . .	11.104
Art 5(3) . . . . .	13.138	2007 Act (13 February 2007) . . . . .	1.11, 1.12, 1.45, 1.75, 1.78, 2.03, 2.37, 2.60, 2.61–2.95, 3.197, 3.204, 7.18, 11.17, 13.09
Art 6(1) . . . . .	13.87	Art 1(1) . . . . .	3.196
Art 6(2) . . . . .	13.90	Art 2(2) . . . . .	2.77, 5.171
Art 6(3) . . . . .	13.91	Art 3 . . . . .	2.98
Art 8(1) . . . . .	13.117	Art 4 . . . . .	2.96, 2.126
Art 9(3) . . . . .	13.121	Art 5 . . . . .	2.127, 4.27
Art 11(1) . . . . .	13.105	Art 7(1) . . . . .	2.119, 5.07
Art 12 . . . . .	2.89	Art 7(2) . . . . .	6.392
Art 12(1) . . . . .	13.106	Art 8 . . . . .	2.95, 4.34, 5.115, 5.164, 13.98
Art 12(2) . . . . .	13.107	Art 9 . . . . .	4.44, 4.46
Art 12(3) . . . . .	13.64, 13.111	Art 10 . . . . .	2.116, 5.06, 5.44
Art 12(5) . . . . .	13.107	Art 11(2) . . . . .	5.120
Art 13(1) . . . . .	13.107	Art 12(1) . . . . .	4.19, 4.51, 4.156, 5.44
Art 23(2) . . . . .	13.134	Art 12(2) . . . . .	2.109, 2.128, 4.22–4.26, 4.41, 4.52
Art 24(1) . . . . .	13.129	Art 13(1) . . . . .	2.112, 6.51, 9.22
Art 26 . . . . .	13.132	Art 13(2) . . . . .	2.122, 6.265
Art 27(1) . . . . .	13.122	Art 14 . . . . .	2.117, 6.256
Art 29(2) . . . . .	13.135	Art 15 . . . . .	2.95, 5.166
Art 34(1) . . . . .	13.160, 13.165, 13.172	Art 17(2) . . . . .	13.121
Art 34(3) . . . . .	13.158	Art 17(11) . . . . .	9.27
Art 35 . . . . .	13.163	Art 19 . . . . .	6.313
Art 35(2) . . . . .	13.154	Art 20(1) . . . . .	9.21, 9.23
Art 36 . . . . .	13.162, 13.167	Art 20(3) . . . . .	5.120, 9.49
Art 37 . . . . .	13.176	Art 21 . . . . .	6.313, 13.86
Art 38 . . . . .	11.35	Art 22 . . . . .	9.28
Art 42 . . . . .	13.106	Art 25 . . . . .	2.143, 4.65, 4.67, 5.11
Art 45 . . . . .	1.62	Art 26 . . . . .	5.14
2004 Act (12 November 2004) . . . . .	1.72, 10.21	Art 27 . . . . .	13.86
Art 2(1) . . . . .	10.10	Art 28 . . . . .	4.77, 5.31, 5.200–5.204
Art 2(2) . . . . .	10.16	Art 28(1) . . . . .	4.68
Art 3 . . . . .	10.21–10.23	Art 28(2) . . . . .	2.95, 5.126, 5.194, 13.98, 13.103
Art 3(5) . . . . .	10.41	Art 28(3) . . . . .	5.30, 13.103
Art 3(7) . . . . .	10.37	Art 29(1) . . . . .	4.67, 5.107
Art 3(9) . . . . .	10.18, 10.34	Art 29(2) . . . . .	2.95, 5.177
Art 4 . . . . .	10.58	Art 30 . . . . .	9.07
Art 5(1) . . . . .	10.59, 10.85	Art 31(1) . . . . .	2.95
2005 Act (21 June 2005) . . . . .	11.187, 11.202	Art 31(3) . . . . .	5.108
Art 6 . . . . .	11.200, 11.206	Art 35 . . . . .	6.360, 13.121
Art 7 . . . . .	11.193	Art 36 . . . . .	6.316
Art 8 . . . . .	11.196		
Art 9 . . . . .	11.195		
2005 Act (10 July 2005) . . . . .	1.44, 1.63, 1.64, 1.89, 7.02–7.75		

*Tables of Legislation, Treaties, and Conventions*

Art 38.....	2.159	Art 68(5) .....	11.72, 11.76
Art 39.....	9.07	Art 69.....	11.160
Art 39(1) .....	13.86	Art 70(1) .....	9.105
Art 39(6) .....	5.30	Art 70(2) .....	9.105
Art 40.....	6.316, 6.358	Art 71(3) .....	2.177, 5.21
Art 41(1) .....	8.02	Art 71(4) .....	4.49
Art 42.....	6.301	Art 71(5) .....	2.170, 2.180, 4.59
Art 42(1) .....	4.175	Art 72.....	1.65
Art 42(3) .....	2.91	2007 Act (13 July 2007)	
Art 42(4) .....	8.11	Art 29.....	1.70
Art 43.....	2.94, 4.175	2008 Act (11 January 2008) .....	7.70
Art 43(1) .....	4.179, 8.02	Civil Code .....	1.76, 2.107, 2.121, 2.125
Art 43(2) .....	4.179	Art 544.....	10.105
Art 44.....	4.163	Art 1048.....	10.105
Art 46.....	9.14, 9.27	Art 1141.....	5.153
Art 47.....	8.24, 9.32, 9.63–9.66	Art 1150.....	6.244
Art 47(1) .....	9.11, 9.57	Art 1166.....	6.241
Art 47(2) .....	9.50	Art 1235.....	8.145
Art 47(3) .....	9.50	Art 1376.....	8.145
Art 47(5) .....	9.55, 9.102	Art 1382.....	6.234, 6.248, 6.269
Art 47(8) .....	9.53	Art 1383.....	6.234, 6.248
Art 47(10) .....	9.53	Art 1690.....	2.146, 5.154, 5.159
Art 47(11) .....	9.11	Art 1832.....	5.97
Art 48(1) .....	8.24, 9.31, 9.32	Art 1853.....	5.98
Art 49(1) .....	8.24, 9.36, 9.47	Art 1855.....	5.97
Art 49(2) .....	9.36, 9.48	Art 1862.....	2.154
Art 50.....	9.33	Art 1865.....	9.03
Art 52.....	2.128	Art 1871.....	9.17
Art 52(1) .....	5.52	Art 1915.....	6.349
Art 52(2) .....	5.94, 8.27, 13.134	Art 1927.....	6.322, 6.350
Art 52(4) .....	8.33	Art 1932.....	6.322, 6.350
Arts 52–57.....	2.95	Art 1934.....	6.351
Art 53.....	4.96, 4.99, 5.163, 6.236	Art 1991.....	6.269
Art 54.....	5.48, 13.132	Art 1994.....	6.260
Art 55.....	8.70	Art 1995.....	6.270
Art 55(1) .....	5.53, 5.55, 8.27, 8.36	Art 2279.....	5.153, 5.154
Art 55(2) .....	8.27, 8.67	Commercial Code	
Art 55(3) .....	8.14, 8.34, 8.63	Art 495.....	6.253
Art 55(4) .....	8.66	Constitution	
Art 55(5) .....	9.35, 9.40	Art 11(6) .....	1.72
Art 56.....	8.11, 8.36	Art 36.....	1.72
Art 57.....	5.55	Art 76.....	1.72
Art 57(1) .....	5.50	Art 108 <i>bis</i> .....	1.72
Art 58.....	8.08, 8.13, 8.14	Criminal Code	
Arts 60–65.....	6.252	Art 135.....	10.64
Art 64.....	2.94, 4.175, 8.02	Arts 246–253.....	10.63
Art 66(1) .....	11.19, 11.55, 13.153	Art 310.....	10.63
Art 66(2) .....	11.83	Arts 322–324.....	10.63
Art 67(1) .....	11.55, 13.176	Arts 368–370.....	10.63
Art 67(3) .....	11.55	Art 379.....	10.63
Art 68(1) .....	11.60	Art 458.....	10.74, 10.76, 10.78, 10.86
Art 68(2) .....	11.61, 11.69, 11.72, 11.76	Art 496.....	10.63
Art 68(4) .....	11.82	Art 506.....	10.63

Grand-Ducal Decree of 17 December 1938 . . . . .	11.119	Art 189 . . . . .	12.42
Grand-Ducal Decree of 15 November 1947 . . . . .	10.77	Art 202 . . . . .	12.85
Grand-Ducal Decree of 19 June 1965 Art 14 . . . . .	7.110	Art 226 . . . . .	12.60
Grand-Ducal Decree of 22 December 1972 . . . . .	1.23	Art 242 . . . . .	12.60
Art 1 . . . . .	1.24	Art 243 . . . . .	12.60
Art 3 . . . . .	1.24	European Convention on Human Rights and Fundamental Freedoms 1950	
Grand-Ducal Regulation of 21 December 1979		Art 8 . . . . .	6.406
Art 1 . . . . .	13.183	Prevention of Fraud (Investments) 1939 (UK) . . . . .	1.18
Grand-Ducal Regulation of 25 August 1983 . . . . .	1.30	UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances . . . . .	10.62
Grand-Ducal Regulation of 19 July 1983 . . . . .	1.42		
Grand-Ducal Regulation of 29 December 1983 . . . . .	1.31	<b>Regulations</b>	
Grand-Ducal Regulation of 30 March 1988 . . . . .	1.35	809/2004/EC . . . . .	7.08, 7.51
Grand-Ducal Regulation of 24 March 1989 . . . . .	10.77	Art 7 . . . . .	7.57
Art 1 . . . . .	10.77	Art 8 . . . . .	7.57
Grand-Ducal Regulation of 14 April 1995 . . . . .	1.39, 1.41	Art 18 . . . . .	7.51
Grand-Ducal Regulation of 24 December 1996 . . . . .	1.41	Annex I . . . . .	7.51
Grand-Ducal Regulation of 14 April 2003 Art 1 . . . . .	11.56, 11.64	Annex III . . . . .	7.52
Art 2 . . . . .	11.67	Annex IV . . . . .	7.57
Art 3 . . . . .	11.84	Annex V . . . . .	7.52, 7.57
Art 5 . . . . .	11.85	Annex XV . . . . .	7.51
Grand-Ducal Regulation of 10 September 2004 . . . . .	13.176	1787/2006/EC . . . . .	7.08
Art 2 . . . . .	13.192	2197/2007/EC . . . . .	7.08
Art 3 . . . . .	13.194		
Grand-Ducal Regulation of 13 July 2007 . . . . .	6.166	<b>Directives</b>	
		Dir 69/335/EEC . . . . .	11.04
<b>EUROPEAN AND INTERNATIONAL LEGISLATION</b>		Dir 73/239/EEC . . . . .	8.64, 8.78, 12.81
EC Treaty		Dir 77/91/EEC (Second Council) . . . . .	2.33, 5.65, 5.124
Arts 1–16 . . . . .	12.07	Arts 19–22 . . . . .	5.174
Art 10 . . . . .	12.39	Art 39 . . . . .	5.174, 5.197
Arts 43–48 . . . . .	12.33	Dir 77/388/EEC . . . . .	12.09
Art 49 . . . . .	12.28	Art 13B . . . . .	13.178
Arts 49–55 . . . . .	12.26	Dir 77/780/EEC . . . . .	8.64, 8.78
Art 56 . . . . .	12.18	Dir 78/660/EEC (Fourth Council) . . . . .	3.42, 3.94
Art 58 . . . . .	12.21	Art 17 . . . . .	3.94
Arts 56–60 . . . . .	11.165, 12.14	Dir 78/885/EEC	
Art 67 . . . . .	12.15	Art 24 . . . . .	9.44
		Dir 79/267/EEC . . . . .	8.64, 8.78
		Dir 80/390/EEC . . . . .	11.204
		Dir 83/349/EEC (Seventh Council) . . . . .	3.95, 11.77
		Art 1 . . . . .	3.94
		Dir 85/303/EEC . . . . .	11.04
		Dir 85/611/EEC (UCITS) . . . . .	1.23, 1.32, 1.34, 1.46, 1.50, 1.79, 1.87, 1.88, 2.01–2.49, 2.135, 2.150, 3.01–3.05, 3.303, 8.64, 11.177, 11.200, 11.206, 12.01–12.112

*Tables of Legislation, Treaties, and Conventions*

Recital 6 . . . . .	7.83	Dir 92/96/EEC . . . . .	8.64
Art 1 . . . . .	2.09, 6.86, 6.110, 8.82	Dir 92/101/EC . . . . .	5.65
Art 1(9) . . . . .	3.37	Dir 93/22/EEC . . . . .	8.78, 12.51
Art 2 . . . . .	2.35, 2.44	Dir 95/26/EC . . . . .	1.42, 8.78
Art 3 . . . . .	6.198	Recital 15 . . . . .	8.64
Art 4 . . . . .	12.58	Dir 93/6/EEC . . . . .	6.97, 6.118, 12.81
Art 5 . . . . .	6.39, 6.40, 6.74, 6.99, 6.114, 6.155, 6.175, 6.195	Art 7 . . . . .	1.42, 8.64, 8.78, 8.87
Art 6 . . . . .	6.31, 6.170, 6.195, 6.206–6.227, 11.87	Dir 93/22/EEC . . . . .	3.13, 3.20–3.24, 8.64
Art 6a . . . . .	1.94	Art 1 . . . . .	3.23
Art 7 . . . . .	6.296, 6.331, 12.49	Art 8(2) . . . . .	6.97, 6.118
Art 8 . . . . .	6.299, 6.300, 12.49	Art 11 . . . . .	6.166, 13.63
Art 9 . . . . .	6.355	Dir 95/26/EC . . . . .	8.64, 8.78
Art 10 . . . . .	6.306, 6.309	Dir 2000/12/EC . . . . .	3.403, 12.81
Art 11 . . . . .	6.312	Art 34 . . . . .	6.110
Art 14 . . . . .	6.296, 6.317, 6.331, 12.49	Art 36 . . . . .	6.110
Art 14(5) . . . . .	2.34	Dir 2001/34/EC . . . . .	1.63, 7.16, 12.81
Art 15 . . . . .	6.299, 6.300, 12.49	Art 11 . . . . .	7.16
Art 17 . . . . .	6.309	Art 48(1) . . . . .	7.21
Art 18 . . . . .	6.312	Dir 2001/97/EC . . . . .	12.53
Art 19(1) . . . . .	2.07, 3.01, 3.33, 3.36–3.50	Dir 2001/107/EC . . . . .	1.50, 1.51, 1.54, 1.57, 3.03, 3.53, 4.126, 4.143, 6.74, 6.78, 6.35, 6.114, 12.01, 12.52
Art 21 . . . . .	3.303	Schs A–C . . . . .	1.56
Art 21(2) . . . . .	3.303	Dir 2001/108/EC . . . . .	1.50, 1.51, 1.57, 3.03, 3.39, 3.50, 3.61, 3.118, 3.164, 3.170, 3.304, 3.381, 12.01, 12.52
Art 21(3) . . . . .	3.136	Recital 13 . . . . .	3.320
Art 24 . . . . .	3.136, 3.144	Recital 14 . . . . .	3.171
Art 25 . . . . .	3.157	Recital 15 . . . . .	3.175
Art 25(3) . . . . .	3.164, 3.177, 3.178	Dir 2003/6 (Market Abuse) . . . . .	12.09
Art 28(1) . . . . .	5.48	Dir 2003/48/EC . . . . .	11.169, 11.173, 11.187, 11.199
Art 28(3) . . . . .	4.127, 4.128	Recital 14 . . . . .	11.169
Art 42 . . . . .	3.24	Art 3 . . . . .	11.181
Art 44 . . . . .	6.196, 12.54	Art 4 . . . . .	11.174
Art 44(1) . . . . .	7.78, 7.22, 8.77	Art 8 . . . . .	11.182
Art 44(2) . . . . .	7.81, 8.77	Art 9 . . . . .	11.183
Art 44(3) . . . . .	7.82, 7.90	Dir 2003/71/EC (Prospectus Directive) . . . . .	1.63, 7.03–7.119, 12.09
Arts 44–48 . . . . .	8.17	Art 17 . . . . .	7.17
Art 45 . . . . .	8.77, 12.64	Art 18 . . . . .	7.17
Art 46 . . . . .	6.196, 8.75, 12.44, 12.64	Dir 2004/39 (MiFID) . . . . .	2.72, 6.90, 12.09
Art 47 . . . . .	8.77, 12.64	Art 13 . . . . .	6.162
Art 50 . . . . .	8.22, 8.64, 8.79, 8.81, 8.88, 12.73	Art 19 . . . . .	6.166
Art 52 . . . . .	8.22	Annex II . . . . .	13.63
Art 53 . . . . .	4.143, 12.01–12.08, 12.82	Dir 2005/1 . . . . .	12.81
Art 53a . . . . .	3.07, 12.87, 12.90	Art 9 . . . . .	12.82
Dir 86/635/EEC . . . . .		Dir 2005/60 . . . . .	10.23
Art 22 . . . . .	6.110	Dir 2006/31/EC . . . . .	3.22
Dir 88/361/EEC . . . . .	12.15	Dir 2006/48/EC . . . . .	
Dir 89/646/EEC . . . . .	8.64, 8.78	Art 57 . . . . .	6.110
Art 12 . . . . .	8.87	Art 64 . . . . .	6.110
Dir 90/435/EEC . . . . .	13.198	Dir 2006/49/EC . . . . .	6.97, 6.112
Art 2 . . . . .	13.201		
Dir 91/308/EEC . . . . .	10.04, 10.70, 11.181		
Dir 92/49/EEC . . . . .	8.64, 8.78, 12.01, 12.81		

*Tables of Legislation, Treaties, and Conventions*

---

Dir 2006/73/EC.....	6.162	Art 8.....	3.60, 3.324, 3.330
Dir 2006/112/EC.....	13.178	Art 10.....	3.190, 3.342
Dir 2007/16/EC (Eligible Assets).....	3.02, 3.14, 3.190, 3.329, 3.348, 12.01	Art 11.....	3.118
Art 2.....	3.19	Art 12.....	3.121
Art 3.....	3.38, 3.67	Art 47.....	3.23
		Art 69.....	3.22

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## LIST OF ABBREVIATIONS

### General

ABBL	<i>Association Luxembourgeoise des Banques et Banquiers</i> (Luxembourg Bankers' Association)
<i>Act dr</i>	<i>Actualités du droit</i> (Belgium)
ALFI	Association of the Luxembourg Fund Industry
<i>Bull François Laurent</i>	<i>Bulletin du Cercle François Laurent</i> (Luxembourg)
<i>Cah dr eur</i>	<i>Cahiers de droit européen</i> (Belgium)
CA	Court of Appeal (Luxembourg)
Cass b	<i>Cour de cassation belge</i> (Belgian Supreme Court of Appeal)
Cass fr	<i>Cour de cassation française</i> (French Supreme Court of Appeal)
Cass lux	<i>Cour de cassation luxembourgeoise</i> (Luxembourg Supreme Court of Appeal)
CESR	Committee of European Securities Regulators
CJEC	Court of Justice of the European Communities
CSSF	<i>Commission de Surveillance au Secteur Financier</i> (Commission for the Supervision of the Financial Sector)
<i>D</i>	<i>Recueil Dalloz</i> (France)
<i>DAOR</i>	<i>Droit des affaires—Ondernemingsrecht</i> (Belgium)
EC	European Communities
ECR	European Court Reports
EEA	European Economic Area, ie the EU Member States plus Iceland, Liechtenstein and Norway
Eligible Assets Directive	Commission Directive (EC) 2007/16 (see 'Legislation and Circulars' below)
ESC	European Securities Committee
EU	European Union, ie Austria, Belgium, Bulgaria, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom
FATF	Financial Action Task Force on money laundering
FCP	<i>Fonds commun de placement</i> (common fund)
IML	<i>Institut Monétaire Luxembourgeois</i> (Luxembourg Monetary Institute), subsequently renamed the <i>Commission de Surveillance du Secteur Financier</i>
<i>JCP</i>	<i>Jurisclasseur périodique (La semaine juridique)</i> (France)
<i>JDF</i>	<i>Journal de droit fiscal</i> (Belgium)

## *List of Abbreviations*

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<i>JT</i>	<i>Journal des tribunaux</i> (Belgium)
<i>Larcier cass</i>	<i>Larcier cassation</i> (Belgium)
LIR	Act of 4 December 1967 concerning the taxation of the income of natural persons and companies ( <i>Tax Code</i> , volume 2, Editions de l'Imprimerie St-Paul)
<i>Mémorial</i>	<i>Mémorial, Journal officiel du Grand-Duché de Luxembourg</i> (official journal of the Grand Duchy of Luxembourg). The <i>Mémorial</i> encompasses the following three compendiums: the legislative compendium ( <i>Mémorial A</i> ), the administrative and economic compendium ( <i>Mémorial B</i> ), and the compendium of companies and associations ( <i>Mémorial C</i> )
MiFID Directive	Directive (EC) 2004/39 (see 'Legislation and Circulars' below)
MTF	Multilateral trading facility
NAV	Net asset value
OECD	Organisation for Economic Cooperation and Development
OJ	Official Journal of the European Communities, subsequently renamed Official Journal of the European Union
<i>Pas</i>	<i>Pasicrisie</i> (Belgium)
<i>Pas lux</i>	<i>Pasicrisie luxembourgeoise</i> (Luxembourg)
<i>RCJB</i>	<i>Revue critique de jurisprudence belge</i> (Belgium)
<i>RDC</i>	<i>Revue de droit commercial belge</i> (Belgium)
<i>Rec Lég Pl Fin</i>	<i>Recueil de la législation sur la place financière de Luxembourg</i> , Central Legislation Department, 2006
<i>Rec Lég Soc</i>	<i>Recueil de la législation des sociétés et associations</i> , Central Legislation Department, 2003
<i>Rép not</i>	<i>Répertoire notarial</i> (Belgium)
<i>Rev Banque</i>	<i>Revue de la Banque</i> (Belgium)
<i>Rev prat soc</i>	<i>Revue pratique des sociétés</i> (Belgium)
<i>Rev soc</i>	<i>Revue des sociétés</i> (France)
<i>Rev trim dr civ</i>	<i>Revue trimestrielle de droit civil</i> (France)
SA	<i>Société anonyme</i> (limited company)
SARL	<i>Société à responsabilité limitée</i> (private limited company)
SCA	<i>Société en commandite par actions</i> (partnership limited by shares)
SCS	<i>Société en commandite simple</i> (limited partnership)
SE	<i>Société européenne</i> (European company)
SICAF	<i>Société d'investissement à capital fixe</i> (investment company with fixed capital)
SICAR	<i>Société d'investissement en capital à risque</i> (investment company in risk capital)
SICAV	<i>Société d'investissement à capital variable</i> (investment company with variable capital)
SIF	Specialized investment fund
Trib arr	<i>Tribunal d'arrondissement</i> (District Court)



## *List of Abbreviations*

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UCI	Undertaking for collective investment
UCITS	Undertaking for collective investment in transferable securities
VAT	Value added tax
VaR	<i>Value at Risk</i>

### **Legislation and Circulars**

1915 Act	Act of 10 August 1915 on commercial companies ( <i>Rec Lég Soc</i> 41)
1929 Act	Act of 31 July 1929 on the taxation of financial holding companies ( <i>Rec Lég Soc</i> , 249)
1983 Act	Act of 25 August 1983 on undertakings for collective investment ( <i>Mémorial A</i> 1983, 1462)
1988 Act	Act of 30 March 1988 on undertakings for collective investment ( <i>Rec Lég Soc</i> , 375)
1991 Act	Act of 19 July 1991 on undertakings for collective investment the securities of which are not intended to be placed with the public ( <i>Rec Lég Soc</i> , 463)
1993 Act	Act of 5 April 1993 on the financial sector ( <i>Rec Lég Pl Fin</i> 97)
Act of 23 December 1998	Act of 23 December 1998 establishing a supervisory commission for the financial sector ( <i>Commission de Surveillance du Secteur Financier</i> ) ( <i>Mémorial A</i> 1998, 2985)
2002 Act	Act of 20 December 2002 on undertakings for collective investment and amending the Act of 12 February 1979, as amended, on value added tax ( <i>Rec Lég Soc</i> 413)
Act of 22 March 2004	Act of 22 March 2004 on securitisation and amending: <ul style="list-style-type: none"><li>● the Act of 5 April 1993, as amended, on the financial sector;</li><li>● the Act of 23 December 1998, as amended, creating a commission for the supervision of the financial sector (<i>Commission de Surveillance du Secteur Financier</i>);</li><li>● the Act of 27 July 2003 on trusts and fiduciary contracts;</li><li>● the Act of 4 December 1967, as amended, on income tax;</li><li>● the Act of 16 October 1934, as amended, on wealth tax;</li><li>● the Act of 12 February 1979, as amended, on value added tax;</li></ul> ( <i>Mémorial A</i> 2004, 720)
Act of 15 June 2004	Act of 15 June 2004 on the investment company in risk capital (SICAR) ( <i>Mémorial A</i> 2004, 1568)
Act of 12 November 2004	Act of 12 November 2004 on the prevention of money laundering and terrorist financing, transposing Directive (EC) 2001/97 of the European Parliament and of the Council of 4 December 2001 amending Council Directive

## List of Abbreviations

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(EEC) 91/308 on prevention of the use of the financial system for the purpose of money laundering and amending:

- the Criminal Code;
  - the Criminal Investigation Code;
  - the Act of 7 March 1980, as amended, on the judicial organization;
  - the Act of 23 December 1998, as amended, creating a commission for the supervision of the financial sector (*Commission de Surveillance du Secteur Financier*);
  - the Act of 5 April 1993, as amended, on the financial sector;
  - the Act of 6 December 1991, as amended, on the insurance sector;
  - the Act of 9 December 1976, as amended, on the organization of the notarial profession;
  - the Act of 10 August 1991, as amended, on the legal profession;
  - the Act of 28 January 1984, as amended, on the organization of the profession of independent auditors;
  - the Act of 10 June 1999 on the organization of the profession of qualified accountants;
  - the Act of 20 April 1977, as amended, on the exploitation of gambling and betting on sports;
  - the General Tax Code (*Abgabenordnung*);
- (*Mémorial A* 2004, 2766)

Act of 10 July 2005

Act of 10 July 2005 on prospectuses for transferable securities:

- transposing Directive (EC) 2003/71 of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive (EC) 2001/34;
- amending the Act of 23 December 1998 creating a commission for the supervision of the financial sector (*Commission de Surveillance du Secteur Financier*);
- amending the Act of 23 December 1998 on supervision of the markets in financial assets;
- amending the Act of 30 March 1988 on undertakings for collective investment;
- amending the Act of 20 December 2002 on undertakings for collective investment;
- amending the Act of 15 June 2004 on investment companies in risk capital;
- amending the Act of 10 August 1915 on commercial companies;

(*Mémorial A* 2005, 1726)

## *List of Abbreviations*

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- Act of 25 August 2006    Act of 25 August 2006:
- on the European company (SE), the *société anonyme à directoire et conseil de surveillance* and the *société anonyme unipersonnelle*;
  - amending the amended Act of 10 August 1915 on commercial companies and certain other legal provisions;
  - amending the Act of 19 December 2002 on the Trade and Companies Register and the accounting and annual financial statements of companies;
  - amending the amended Act of 30 March 1988 on undertakings for collective investment;
  - amending the Act of 20 December 2002 on undertakings for collective investment;
  - amending the Act of 25 July 1990 on the status of directors representing the State or a legal person under public law in an SA;
  - amending the Act of 4 December 1992 on the information to be disclosed when acquiring and divesting a material holding in a company listed on the stock exchange;
  - amending the Act of 13 July 2005 on professional retirement institutions in the form of SEPCAVs and ASSEPs;
- (*Mémorial A* 2006, 2684)
- Act of 13 February 2007    Act of 13 February 2007 relating to specialized investment funds (SIFs) and amending:
- the amended Act of 20 December 2002 on undertakings for collective investment;
  - the amended Act of 12 February 1979 concerning value added tax;
- (*Mémorial A* 2007, 368)
- Act of 13 July 2007    Act of 13 July 2007 on markets in financial instruments transposing:
- Directive (EC) 2004/39 of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives (EEC) 85/611 and (EEC) 93/6 and Directive (EC) 2000/12 of the European Parliament and of the Council and repealing Council Directive (EEC) 93/22;
  - Article 52 of Commission Directive (EC) 2006/73 of 10 August 2006 implementing Directive (EC) 2004/39 of the European Parliament and of the Council as regards organizational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive;

and amending:

- the Act of 5 April 1993, as amended, on the financial sector,
- the Act of 20 December 2002, as amended, on undertakings for collective investment,
- the Act of 12 November 2004 on combating money laundering and terrorist financing,
- the Act of 31 May 1999, as amended, on company domiciliation,
- the Act of 23 December 1998, as amended, creating a commission for the supervision of the financial sector (*Commission de Surveillance du Secteur Financier*),
- the Act of 6 December 1991, as amended, on the insurance sector,
- the Act of 3 September 1996 concerning the involuntary dispossession of bearer securities,
- the Act of 23 December 1998 concerning the monetary status and the central bank of Luxembourg (*Banque centrale du Luxembourg*),

and repealing:

- the Act of 23 December 1998, as amended, on supervision of the markets in financial assets,
- the Act of 21 June 1984, as amended, on futures markets (*Mémorial A 2007, 2076*)

Circular 91/75

IML Circular 91/75 of 21 January 1991

Circular 00/14

CSSF Circular 00/14 of 27 July 2000 on the adoption of the Act of 17 July 2000 amending certain provisions in the Act of 30 March 1988 with regard to undertakings for collective investment

Circular 02/77

CSSF Circular 02/77 of 27 November 2002 on the protection of investors in the event of NAV calculation error and correction of the consequences resulting from non-compliance with the investment rules applicable to undertakings for collective investment

Circular 02/80

CSSF Circular 02/80 of 5 December 2002 on the specific rules applicable to Luxembourg undertakings for collective investment ('UCI') pursuing alternative investment strategies

Circular 02/81

CSSF Circular 02/81 of 6 December 2002 on guidelines concerning the duties of auditors of undertakings for collective investment

Circular 03/87

CSSF Circular 03/87 of 21 January 2003 on the coming into force of the Act of 20 December 2002 on undertakings for collective investment

Circular 03/88

CSSF Circular 03/88 of 22 January 2003 on the classification of undertakings for collective investment governed by the

## *List of Abbreviations*

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	provisions of the Act of 20 December 2002 on undertakings for collective investment
Circular 03/97	CSSF Circular 03/97 of 28 February 2003 on the publication in the electronic database for the financial centre ( <i>référentiel de la place</i> ) of simplified and full prospectuses and the annual and half-yearly reports by undertakings for collective investment
Circular 03/108	CSSF Circular 03/108 of 30 July 2003 on Luxembourg management companies subject to Chapter 13 of the Act of 20 December 2002 on undertakings for collective investment, and Luxembourg self-managed investment companies subject to Article 27 or Article 40 of the Act of 20 December 2002
Circular 03/122	CSSF Circular 03/122 of 19 December 2003 on clarifications concerning the simplified prospectus
Circular 04/146	CSSF Circular 04/146 of 17 June 2004 on the protection of undertakings for collective investment and their investors against late trading and market timing practices
Circular 04/151	CSSF Circular 04/151 of 13 July 2004 on the information to be published in the listing particulars of the securities specified below: <ul style="list-style-type: none"><li>● shares and units of foreign UCIs whose securities are not publicly available, offered or sold in or from Luxembourg, and</li><li>● securities redeemable or exchangeable for shares or units of UCIs or whose income and/or redemption is/are linked to underlying shares or units of UCIs</li></ul>
Circular 04/155	CSSF Circular 04/155 of 27 September 2004 on the compliance function
Circular 05/176	CSSF Circular 05/176 of 5 April 2005 on the rules of conduct to be adopted by undertakings for collective investment in transferable securities in relation to the use of financial derivative instruments
Circular 05/177	CSSF Circular 05/177 of 6 April 2005 on the abolition of any prior approval by the CSSF of advertising material issued by persons and companies supervised by the CSSF; revocation of point II of Chapter L of IML Circular 91/75; revocation of the two last sentences of point IV 5.11 of CSSF Circular 2000/15
Circular 05/178	CSSF Circular 05/178 of 11 April 2005 on administrative and accounting organization; outsourcing of IT services; revocation of point 4.5.2 of IML Circular 96/126 and replacement by point 4.5.2 of this Circular
Circular 05/185	CSSF Circular 05/185 of 24 May 2005 on Luxembourg management companies subject to the provisions of

## *List of Abbreviations*

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- Chapter 13 of the Act of 20 December 2002 relating to undertakings for collective investment, as well as Luxembourg self-managed investment companies subject to the provisions of Article 27 or Article 40 of the Act of 20 December 2002 relating to undertakings for collective investment
- Circular 05/186 CSSF Circular 05/186 of 25 May 2005 on the guidelines of the Committee of European Securities Regulators (CESR) regarding the application of transitional measures resulting from Directives (EC) 2001/107 and (EC) 2001/108 (UCITS III) amending Directive (EEC) 85/611 (UCITS I)
- Circular 05/188 CSSF Circular 05/188 of 27 May 2005 on the coming into force of the Act of 12 November 2004 on combating money laundering and terrorist financing
- Circular 05/210 CSSF Circular 05/210 of 10 October 2005 on the drawing-up of a simplified prospectus within the scope of Chapter 1 of Part III of the Act on prospectuses for securities
- Circular 05/211 CSSF Circular 05/211 of 13 October 2005 on combating money laundering and terrorist financing and prevention of the use of the financial sector for the purpose of money laundering and terrorist financing
- Circular 05/225 CSSF Circular 05/225 of 16 December 2005 on the concept of 'offer to the public of securities' as defined in the Act on prospectuses for securities and the consequential 'obligation to publish a prospectus'
- Circular 05/226 CSSF Circular 05/226 of 16 December 2005 on a general overview of the Act on prospectuses for securities and technical specifications regarding communication to the CSSF of documents with a view to authorization or for filing and of notices for offers to the public and admissions to trading on a regulated market
- Circular 06/241 CSSF Circular 06/241 of 5 April 2006 on the concept of risk capital under the Act of 15 June 2004 relating to the investment company in risk capital (SICAR)
- Circular 06/267 CSSF Circular 06/267 of 22 November 2006 on technical specifications regarding the filing with the CSSF, in accordance with the Act on prospectuses for securities, of documents for approval or notification purposes and of notices for offers to the public of units/shares of Luxembourg closed-end UCIs and admissions of units/shares of Luxembourg closed-end UCIs to trading on a regulated market
- Circular 06/272 CSSF Circular 06/272 of 21 December 2006 on technical specifications regarding the filing with the CSSF, in accordance with the Act on prospectuses for securities,

## *List of Abbreviations*

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	of documents for approval or notification purposes and of notices for offers to the public of securities issued by SICARs and admissions of securities issued by SICARs to trading on a regulated market
Circular 07/277	CSSF Circular 07/277 of 9 January 2007 on the new notification procedure following guidelines issued by the Committee of European Securities Regulators (CESR) regarding the simplification of the UCITS notification procedure
Circular 07/283	CSSF Circular 07/283 of 28 February 2007 on the entry into force of the Act of 13 February 2007 relating to specialized investment funds
Circular 07/290	CSSF Circular 07/290 of 3 May 2007 on the definition of capital ratios pursuant to Article 56 of the amended Law of 5 April 1993 on the financial sector (application to investment firms and management companies subject to Chapter 13 of the Law of 20 December 2002, as amended)
Circular 07/307	CSSF Circular 07/307 of 31 July 2007 on the MiFID: Conduct of business rules in the financial sector
Circular 07/308	CSSF Circular 07/308 of 2 August 2007 on the rules of conduct to be adopted by undertakings for collective investment in transferable securities with respect to the use of a methodology for the management of financial risk, and the use of derivative financial instruments
Circular 07/309	CSSF Circular of 3 August 2007 on risk spreading in the context of specialized investment funds (SIFs)
Circular 07/310	CSSF Circular of 3 August 2007 on financial information to be provided by specialized investment funds (SIFs), as amended by CSSF Circular 08/348
Circular 08/339	CSSF Circular 08/339 of 19 February 2008 on the guidelines of the Committee of European Securities Regulators (CESR) concerning eligible assets for investment by UCITS
Circular 08/348	CSSF Circular 08/348 of 17 April 2008 on the changes to circulars IML 97/136 and CSSF 07/310
Circular 08/350	CSSF Circular 08/350 of 22 April 2008 on clarifications relating to the amendments introduced by the Act of 13 July 2007 on markets in financial instruments to the status of professionals of the financial sector (PFS) referred to in Articles 29-1, 29-2, 29-3, or 29-4 and designated as 'support PFS', as well as on the amendment to the prudential supervisory procedures for support PFS
Circular 08/356	CSSF Circular 08/356 of 4 June 2008 regarding rules applicable to UCIs which employ certain techniques and instruments relating to transferable securities and money market instruments

## *List of Abbreviations*

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Directive 85/611	Council Directive (EEC) 85/611 of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), as amended [1985] OJ L375/3
Directive 93/22	Council Directive (EEC) 93/22 of 10 May 1993 on investment services in the securities field [1993] OJ L141/27. Directive (EEC) 93/22 was repealed by Directive (EC) 2004/39 (MiFID). Its repeal took effect on 1 November 2007 (Article 69 of Directive (EC) 2004/39 as amended by Directive (EC) 2006/31 of 5 April 2006 [2006] OJ L114/60
Directive 2001/97	Directive (EC) 2001/97 of the European Parliament and of the Council of 4 December 2001 amending Directive (EEC) 91/308 of the Council on prevention of the use of the financial system for the purpose of money laundering [2001] OJ L344/76
Directive 2001/107	Directive (EC) 2001/107 of the European Parliament and of the Council of 21 January 2002 amending Council Directive (EEC) 85/611 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) with a view to regulating management companies and simplified prospectuses [2002] OJ L41/20
Directive 2001/108	Directive (EC) 2001/108 of the European Parliament and of the Council of 21 January 2002 amending Council Directive (EEC) 85/611 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), with regard to investments of UCITS [2002] OJ L41/35
Directive 2003/6	Directive (EC) 2003/6 of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) [2003] OJ L96/16
Directive 2003/48	Directive (EC) 2003/48 of the European Parliament and of the Council of 3 June 2003 on the taxation of savings income in the form of interest payments [2003] OJ L157/38
Directive 2003/71	Directive (EC) 2003/71 of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading, and amending Directive (EC) 2001/34 [2003] OJ L345/65
Directive 2004/39 or MiFID	Directive (EC) 2004/39, 'MiFID' (Market in Financial Instruments Directive) of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives (EEC) 85/611 and (EEC) 93/6 and Directive (EC) 2000/12 of the European



## *List of Abbreviations*

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	Parliament and of the Council and repealing Council Directive (EEC) 93/22 [2004] OJ L145/1 with effect from 1 November 2007 (Article 69 of Directive (EC) 2004/39 as amended by Directive (EC) 2006/31 of 5 April 2006 [2006] OJ L114/60)
Directive 2006/48	Directive (EC) 2006/48 of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) [2006] L177/1
Directive 2006/73	Commission Directive (EC) 2006/73 of 10 August 2006 implementing Directive (EC) 2004/39 of the European Parliament and of the Council as regards organizational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive [2006] OJ L241/26
Directive 2007/16 or Eligible Assets Directive	Commission Directive (EC) 2007/16 of 19 March 2007 implementing Council Directive (EEC) 85/611 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards the clarification of certain definitions [2007] OJ L79/11
EC Treaty	Treaty constituting the European Community, consolidated version published in 2002 OJ C325/33
Grand-Ducal Regulation of 13 July 2007	Grand-Ducal Regulation of 13 July 2007 relating to the organizational requirements and the rules of conduct in the financial sector and transposing Commission Directive (EC) 2006/73 of 10 August 2006 implementing Directive (EC) 2004/39 of the European Parliament and of the Council as regards organizational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive ( <i>Mémorial A</i> 2007, 2134)
Grand-Ducal Regulation of 8 February 2008	Grand-Ducal Regulation of 8 February 2008 relating to certain definitions of the law of 20 December 2002 as amended concerning undertakings for collective investment and implementing Commission Directive (EC) 2007/16 of 19 March 2007 implementing Council Directive (EEC) 85/611 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards the clarification of certain definitions ( <i>Mémorial A</i> , 2008, 303)

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# 1

## INTRODUCTION

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<b>Definition of Undertaking for Collective Investment</b>		Act of 20 December 2002 with regard to undertakings for collective investment	1.46
<i>Collective investment of savings</i>	1.01		
<i>Investment according to the principle of risk spreading</i>	1.03	Act of 13 February 2007 relating to specialized investment funds	1.66
<i>Raising capital from the public</i>	1.05		
<b>Historical Background</b>	1.13	Circulars issued by the supervisory authorities	1.67
<b>Legal Sources</b>	1.23	<i>Laws and regulations not limited to UCIs</i>	1.74
<i>Specific laws and regulations applicable to UCIs</i>	1.23	<b>Role of the CSSF</b>	1.77
<b>Chronological record of laws and regulations</b>	1.23	<i>General presentation</i>	1.77
Grand-Ducal Decree of 22 December 1972 concerning the supervision of investment funds	1.23	<i>Supervision of UCIs</i>	1.81
1983 Act concerning undertakings for collective investment	1.26	UCIs established in the Grand Duchy of Luxembourg	1.81
1988 Act concerning undertakings for collective investment	1.32	UCIs established in foreign countries	1.86
Act of 19 July 1991 concerning undertakings for collective investment whose securities are not intended for the public	1.45	Coordinated UCITS	1.86
		Other UCIs under foreign law	1.89
		<i>Supervision of management companies</i>	1.91
		Management companies established in the Grand Duchy of Luxembourg	1.91
		Management companies established in foreign countries	1.94

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### Definition of Undertaking for Collective Investment

Rather than introducing a general definition of undertaking for collective investment (UCI), the authors of the 2002 Act, in line with the 1988 Act, sought to define its constituent elements. Three basic criteria are required to constitute a UCI. A UCI is an investment structure: **1.01**

- (1) the exclusive object of which is the collective investment of savings;

- (2) which invests in assets (transferable securities or other assets) and operates in accordance with the principle of risk spreading;
- (3) the funds of which, used for collective investment, have been raised from the public.

**1.02** The first two criteria must always be met. The last—the raising of funds from the public—may be dispensed with in certain cases specified by law. All of these criteria were considered and clarified by the CSSF, the prudential authority for UCIs, in Circular 91/75.<sup>1</sup>

### *Collective investment of savings*

**1.03** The collective investment of savings is defined as the common investment of a number of individual investment contributions raised from the public. They may be invested in transferable securities or other assets.

**1.04** Investment suggests that the purchase or sale of portfolio assets is carried out solely with the objective of generating a yield or capital gains. In contrast with other types of financial vehicles, a UCI does not acquire interests in order to obtain influence or control, albeit certain UCIs, such as those investing in venture capital assets, can in fact hold significant interests in certain companies. However, even in those circumstances, the UCI's main purpose is not to exercise control over the target company but rather to generate a return. The objective of a UCI is to show a capital gain once the company is sufficiently mature.

### *Investment according to the principle of risk spreading*

**1.05** Spreading investment risks avoids the excessive concentration of a UCI's investments and reduces investment risk. A minimum level of diversification of investments between assets of different types and issuers is required, although this requirement is interpreted differently, depending on the type of UCI.

### *Raising capital from the public*

**1.06** Capital is raised from 'the public' when it is raised from a group of investors which extends beyond a 'small circle of persons'.<sup>2</sup> There is no fixed minimum threshold beyond which the target investors cease to be a 'small circle of persons'.

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<sup>1</sup> Ch B, I, Circular 91/75. A fourth criterion, not included as such in Circular 91/75, stipulates that Luxembourg-based UCIs must issue units or securities in accordance with Arts 2(2), 65(1), 69, and 73 of the 2002 Act. This requirement excludes certain structures from the scope of the legislation governing UCIs. See 2.161 below.

<sup>2</sup> Ch B, I, Circular 91/75.

The threshold in question is considered on a case-by-case basis by the CSSF, which does not, for example, regard family holding companies and investment clubs as collecting savings from the public albeit they are ‘pursuing the objective of the collective investment of savings’.<sup>3</sup>

In the course of Parliamentary debates prior to the enactment of the 2002 Act it had been proposed not to regulate groups of investors comprising fewer than twenty persons.<sup>4</sup> An undertaking that does not wish to place its units with a larger number of investors therefore would not have come within the sphere of the 2002 Act. However, the legislation did not expressly provide for this clarification. **1.07**

In addition the launch by a promoter of a UCI intended to be sold only to entities within its own group, is not a ‘public’ offering of units. Investors should be sought from ‘outside’ the group of companies rather than ‘within’ the relevant corporate group. A public offer is effected only when marketing efforts are targeted at a promoter’s clientele or the clientele of one or more group entities. **1.08**

A UCI must intend to place its units or shares with the public, regardless of whether or not it achieves this result. Failure to sell to the public does not automatically result in failure to satisfy the requirement, provided the UCI can demonstrate its bona fide intention to market its units or shares to the public. **1.09**

There is no other definition of the term ‘public’. The investor can be either institutional or private and an investor in the case of a ‘public’ offer is not required to meet any requirement as to status or capacity. **1.10**

However, the term ‘public’ can have several meanings in the context of UCIs, depending on the situation. For example, in the context of raising funds for a UCI, it means a relatively large group of persons. In contrast, in other circumstances, it can be used to distinguish the type of investor concerned, for example to draw a distinction between well-informed investors and the ‘general public’. This distinction is highly relevant in differentiating the scope of the 2002 Act and the Act of 13 February 2007 respectively. The 2002 Act refers to the public as an ‘unrestricted circle of persons’ whereas the Act of 13 February 2007, in limiting the eligibility of investors in funds authorized under the Act of 13 February 2007, to well-informed investors, refers to ‘the public’ as any investor who is not well informed. **1.11**

Thus, it is not always necessary for a UCI to raise capital from the ‘public’. The Act of 13 February 2007 permits the creation of UCIs ‘whose units or shares are sold to one or more well-informed investors’, and UCIs authorized under the Act of **1.12**

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<sup>3</sup> Ch B, II, Circular 91/75.

<sup>4</sup> This figure is mentioned in the Parliamentary documents for the Act of 2 August 2003, which amended the 1993 Act (*Parliamentary doc* No 5085, Explanatory Statement, 14).

13 February 2007 will therefore not necessarily raise funds from ‘an unrestricted circle of persons’, ie the ‘public’ as defined in the 2002 Act,<sup>5</sup> and can, indeed must, target a select investor group.<sup>6</sup>

## Historical Background

- 1.13** UCIs have existed since the late nineteenth century, even though they only came into their own in the twentieth century. For instance, the years between 1880 and 1900 saw the rise in Scotland of the investment trust company whose objective was to invest in farm mortgages.<sup>7</sup> This Scottish innovation subsequently crossed the Atlantic to the United States, where it became a popular investment vehicle, especially after the First World War. Emboldened by their success, the managers of such investment companies borrowed increasingly large amounts for investment purposes. The assets managed by some of those companies were out of all proportion to their share capital, resulting in their demise during the Wall Street crash of 1929.
- 1.14** The Wall Street crash led to an increased interest by US investors in another type of UCI, the unit trust rather than a corporate structure. First constituted in England in 1868, this type of UCI initially ran into legal difficulties. One judge considered it a breach of English company law. While that judgment was overturned on appeal, it prompted the conversion into limited liability companies or liquidation of many such trusts.
- 1.15** In unit trusts, securities are bought and vested in a trustee, generally a regulated institution such as a bank or an insurance company. In return for payment/subscriptions for units, investors become the trust’s beneficiaries and are issued with ‘units’ representing their rights. The management of a trust’s portfolio is entrusted to a management company separate and distinct from the trustee.
- 1.16** The unit trust structure offered two major advantages compared with investment companies. First, securities acquired by a trust were held in the custody of a trustee

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<sup>5</sup> An investment structure that does not canvass the public is not necessarily governed by the Act of 13 February 2007. An undertaking engaged in the collective investment of assets according to the principle of risk spreading, which reserves its units or shares for well-informed investors and does not canvass the public for funds, may either opt for application of the Act of 13 February 2007 and the regulations laid down by the CSSF or adopt, for example, the status of a non-regulated financial company whose activity is not supervised by the CSSF. For further explanations about these aspects, see 2.85 and 2.86 below.

<sup>6</sup> Art 1(1), Act of 13 February 2007, under which SIFs may reserve their securities for ‘one or several well-informed investors’.

<sup>7</sup> The following discussion is mainly drawn from CO Merriman, *Unit Trusts and How They Work* (Pitman & Sons, 2nd edn, 1959) 1–10.

who was independent from the management company. Secondly, trust participants could at any time sell their units back to the trust, whereas an investment company was not entitled to buy back its own shares.

It was another fifty years before these structures re-emerged in Europe. The first Swiss trust was created in 1930. Similarly, the successful sale in Great Britain of units in US trusts prompted British financiers to revive this type of product in 1931. **1.17**

Nevertheless, the British investment community quickly distinguished itself from its American counterpart. Chastened by the lessons learnt from the crash of 1929, the Americans had laid down extremely rigid management rules, whereas the British introduced ever greater flexibility. In a US trust, the composition of the portfolio had to be settled once and for all, and securities could be sold only under extremely strict conditions. The conditions imposed on trusts set up under English law were, from the outset, more flexible. The managers of English trusts were gradually authorized to sell portfolio securities when they considered this to be in the best interests of the unitholders, thereby boosting the popularity of this type of trust, of which there were 98 in England by 1939, covered by special regulations under the Prevention of Fraud (Investments) 1939 Act, which came into force on 8 August 1944. **1.18**

The fund industry has continued to grow steadily ever since. In 1940, there were 111 investment funds in the United States, comprising 43 companies and 68 trusts. By 1957, there were 167 funds, comprising 24 companies and 143 trusts.<sup>8</sup> **1.19**

1959 saw the creation of the first investment fund in the Grand Duchy of Luxembourg, under the prescient name 'FCP Eurunion'.<sup>9</sup> Broadly inspired by the trust structure described above, this was built around three components: **1.20**

- (1) a depository bank responsible for keeping the securities in safe custody and overseeing their management;
- (2) a management company responsible for managing and building up the portfolio;
- (3) unitholders, the joint owners of the securities portfolio.

The relationships between the three parties were governed by management regulations.

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<sup>8</sup> *ibid* 13.

<sup>9</sup> M-J Chèvremont, 'Évolution de l'industrie des fonds d'investissement en Europe et au Luxembourg en particulier', in *Les fonds d'investissement, réglementation-fiscalité-évolution*, Seminar held on 24 and 25 November 1988, *Association Luxembourgeoise des Juristes de Banque (ALJB), Institut Universitaire International Luxembourg (IUIL)* 5.

- 1.21** During the same period, ie in 1959 and 1960, the first incorporated investment funds emerged in the Grand Duchy of Luxembourg. In contrast with the English model, such companies were able to repurchase their own shares indirectly from their shareholders, under a structure involving the creation of a separate company known as a 'repurchase company'. Having waited a long time before creating a UCI based on the British model, the Grand Duchy of Luxembourg thus took an additional step, offering investors an opportunity that English investment companies were unable to provide.
- 1.22** Investment funds soon became an integral part of Luxembourg's investment scene, helped by a flexible and robust legal and regulatory environment, attractive tax treatment and the steadily growing expertise of local service providers. In 1970, there were 102 UCIs in the Grand Duchy of Luxembourg. In 2008, there are 3,105,<sup>10</sup> with aggregate net assets of €1,996,959 billion,<sup>11</sup> placing the Grand Duchy of Luxembourg second in the world behind the United States in terms of fund volumes.

## Legal Sources

### *Specific laws and regulations applicable to UCIs*

#### Chronological record of laws and regulations

##### *Grand-Ducal Decree of 22 December 1972 concerning the supervision of investment funds*

- 1.23** The Grand-Ducal Decree of 22 December 1972<sup>12</sup> was the first Luxembourg regulation to be adopted with regard to UCIs.<sup>13</sup> Prior to the adoption of that Decree, corporate UCIs had been created under the 1915 Act and for tax purposes were governed by the 1929 Act. This infrastructure was complemented by administrative decisions and recommendations, *inter alia*, from the Treasury Minister, the registration authority,<sup>14</sup> and the Banking Commissioner. This legal framework contained numerous loopholes and, especially for FCPs, turned out to be inadequate, as revealed by the IOS scandal towards the end of the 1960s.<sup>15</sup>

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<sup>10</sup> This figure comprises 1,259 traditional UCIs and 10,457 sub-funds of umbrella UCIs.

<sup>11</sup> Figures for 31 May 2008; source: monthly press release published by the CSSF on the general situation of UCIs (July 2008 edition).

<sup>12</sup> Grand-Ducal Decree of 22 December 1972 concerning the supervision of investment funds (*Mémorial A* 1972, 2112).

<sup>13</sup> In the Grand Duchy of Luxembourg, the term *fonds d'investissement*, which is a literal translation of the English *investment fund*, was used until the 1983 Act introduced the concept of 'undertaking for collective investment', also found in Directive (EEC) 85/611.

<sup>14</sup> *Administration de l'Enregistrement*.

<sup>15</sup> Following a large-scale advertising campaign, Investors Overseas Services (IOS) persuaded more than 700,000 persons to subscribe for units in two FCPs it had created in the Grand Duchy of Luxembourg: the International Investment Trust and the Fund of Funds. Management of these



The Grand-Ducal Decree of 22 December 1972 was adopted in response to the IOS scandal. The 1972 Decree defined the meaning of ‘investment funds’ for the first time<sup>16</sup> and conferred on the Banking Commissioner supervisory authority over all Luxembourg-based UCIs (whether of a contractual, corporate, or other type) and all foreign investment funds whose units or shares were offered to the public in or from the Grand Duchy of Luxembourg.<sup>17</sup> The Grand-Ducal Decree further required UCIs to have their accounts audited by an independent expert who, ‘whilst providing assurances as to his probity and professional qualifications’,<sup>18</sup> was also obliged to provide the Banking Commissioner with ‘all information or certificates required by the Commissioner in the areas of expertise of the expert in the performance of the audit’.<sup>19</sup> **1.24**

In regulations issued on 8 November 1974,<sup>20</sup> the Banking Commissioner set out the rules governing the monthly financial reports to be prepared and submitted by UCIs under his supervision. **1.25**

*1983 Act concerning undertakings for collective investment*

The rapid development of UCIs in the 1970s evidenced the need for more systematic regulation of the organization, operation, and supervision of collective investment undertakings. Initially presented in Parliament on 31 December 1979,<sup>21</sup> comprehensive legislation was finally adopted four years later in the form of the 1983 Act. **1.26**

In the preamble to the Bill, the government noted the absence of specific regulations governing UCIs and stated that ‘in order to protect savings, there is clearly an urgent need to specify the legal basis for such undertakings and to enact operating rules to eliminate any legal uncertainty in this area’.<sup>22</sup> **1.27**

At the time, the government was aware of the need to align the regime for Luxembourg-based UCIs with European Community law. In Parliamentary documents, it stressed the need to ‘provide the parties concerned with an instrument capable of surviving, without amendment, the transposition into national law of EEC directives’.<sup>23</sup> **1.28**

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UCIs was a disaster. Moreover, their assets had no genuine substance. The investors lost nearly their entire investment.

<sup>16</sup> Art 1(1) of the Grand-Ducal Decree of 22 December 1972 concerning the supervision of investment funds (*Mémorial A 1972*, 2112).

<sup>17</sup> *ibid* Art 1(2).

<sup>18</sup> *ibid* Art 3(1).

<sup>19</sup> *ibid* Art 3(2).

<sup>20</sup> Approved by Ministerial Decree of 19 November 1974 concerning the approval of Banking Commissioner Reg No VM/1 of 8 November 1974 concerning the monthly financial reports to be prepared and submitted by the investment funds under his supervision (*Mémorial A 1974*, 1718).

<sup>21</sup> *Parliamentary doc* No 2366, Contents, 1.

<sup>22</sup> *ibid* Preamble, 18.

<sup>23</sup> *ibid* Preamble, 17.

- 1.29** The 1983 Act specifically governed the operation of FCPs. It introduced the SICAV, inspired by French legislation, into Luxembourg law. It also provided the legal framework for the other structures available to Luxembourg-based UCIs, and confirmed earlier regulations on the public offerings of units or shares in foreign UCIs in or from the Grand Duchy of Luxembourg.
- 1.30** The Grand-Ducal Regulation of 25 August 1983<sup>24</sup> determined the amount of fixed capital duty applicable to UCIs governed by the 1983 Act.
- 1.31** This was followed by the Grand-Ducal Regulation of 29 December 1983,<sup>25</sup> which laid down the rules governing the publication and filing of financial statements and reports by UCIs subject to supervision by the *Institut Monétaire Luxembourgeois*, which had succeeded<sup>26</sup> the Banking Commissioner under the Act of 20 May 1983.<sup>27</sup>

*1988 Act concerning undertakings for collective investment*

- 1.32** **Content** Already in the pipeline when the 1983 Act was approved, Directive 85/611 (the UCITS Directive) was adopted two years later and transposed into Luxembourg law by the 1988 Act.
- 1.33** The Directive coordinates the legislation of EEA Member States with regard to UCIs which invest in transferable securities and—since 2003—in other liquid financial assets (UCITS). It does not deal with other types of UCI, which Member States are free to regulate under local law and regulation.
- 1.34** Directive 85/611 could have been transposed into Luxembourg law simply by amending the 1983 Act. The government nevertheless felt that, ‘in order to improve the previous regime in certain areas and . . . to permit broader application of the instrument of undertakings for collective investment’, it was necessary to ‘review the entire subject-matter and to develop a law governing all undertakings for collective investment’.<sup>28</sup>

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<sup>24</sup> Grand-Ducal Regulation of 25 August 1983 determining the fixed duty applicable to the capital collected in undertakings for collective investment governed by the Act of 25 August 1983 (*Mémorial A* 1983, 1476).

<sup>25</sup> Grand-Ducal Regulation of 29 December 1983 concerning the publication and periodic submission of financial statements and reports by UCIs subject to supervision by the *Institut Monétaire Luxembourgeois* (*Mémorial A* 1983, 2676).

<sup>26</sup> Art 30, Act of 20 May 1983.

<sup>27</sup> Act of 20 May 1983 concerning the creation of the *Institut Monétaire Luxembourgeois* (*Mémorial A* 1983, 915), as amended by the Acts of 24 December 1984 (*Mémorial A* 1984, 2103), 22 December 1986 (*Mémorial A* 1986, 2403), 21 September 1990 (*Mémorial A* 1990, 734), 16 August 1991 (*Mémorial A* 1991, 1253), 5 April 1993 (*Mémorial A* 1993, 462), 23 December 1995 (*Mémorial A* 1995, 2303) and 22 April 1998 (*Mémorial A* 1998, 466).

<sup>28</sup> *Parliamentary doc* No 3172, Preamble, 32.

A Grand-Ducal Regulation of 30 March 1988<sup>29</sup> determined the amount of the fixed capital duty applicable to UCIs governed by the 1988 Act, without changing the situation which had existed since 1983. **1.35**

The 1988 Act was repealed by the 2002 Act with effect from 13 February 2007. During the interim period, the two laws coexisted under a parallel system. **1.36**

Because the 2002 Act contains most of the provisions of the 1988 Act, many comments on the 1988 Act, particularly the Parliamentary documents preceding its enactment, remain relevant and the 1988 Act will be frequently referred to in this work. **1.37**

### **Amendment of the 1988 Act**

*Act of 23 December 1994* The Act of 23 December 1994<sup>30</sup> introduced the first change in the rate of the annual subscription tax paid by Luxembourg-based UCIs, as this tax had proved to be a disincentive for certain types of UCI wishing to establish in the Grand Duchy of Luxembourg, particularly money market funds. **1.38**

This Act reduced the subscription tax to 0.03 per cent for UCIs investing in money market instruments or cash and subscriptions by Luxembourg UCIs into other Luxembourg-based UCIs. The conditions for the application of the reduced tax rate and the qualifying criteria for money market instruments were set out in a Grand-Ducal Regulation of 14 April 1995.<sup>31</sup> **1.39**

*Act of 24 December 1996* The Act of 24 December 1996<sup>32</sup> further reduced the subscription tax rate for certain types of Luxembourg-based UCIs to 0.01 per cent.<sup>33</sup> This reduction applied to UCIs investing in money market instruments and/or demand or time deposits, and institutional UCIs within the meaning of the 1991 Act which provided a framework for funds sold solely to institutional investors. In addition, subscriptions by Luxembourg UCIs into other Luxembourg-based UCIs were entirely exempted from subscription tax. **1.40**

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<sup>29</sup> Grand-Ducal Regulation of 30 March 1988 determining the fixed duty applicable to the capital collected in undertakings for collective investment governed by the Act of 30 March 1988 (*Mémorial A* 1988, 168).

<sup>30</sup> Art 12, Act of 23 December 1994 concerning State revenues and expenditure for the 1995 fiscal year (*Mémorial A* 1994, 2481), amending Art 108, 1988 Act.

<sup>31</sup> Grand-Ducal Regulation of 14 April 1995 adopted in application of Art 108 of the Act of 30 March 1988 concerning undertakings for collective investment, as amended by the Act of 23 December 1994 concerning State revenues and expenditure for the 1995 fiscal year (*Mémorial A* 1995, 906).

<sup>32</sup> Art 5, Act of 24 December 1996 amending certain direct and indirect tax provisions (*Mémorial A* 1996, 2911).

<sup>33</sup> For the sequence and stages of the reduction, see 11.63 *et seq* below.

- 1.41** Issued on the same day, another Grand-Ducal Regulation<sup>34</sup> defined the concept of a ‘money-market instrument’ and set out the terms and conditions governing the reduced tax rate.<sup>35</sup>
- 1.42** *Act of 29 April 1999* The Community legislature did not remain idle after adopting Directive 85/611. The scope of certain Community standards, including Directive 85/611, was extended to the EEA within the framework of the Agreement on the European Economic Area signed in Porto on 2 May 1992. Pursuant to Annexe IX to that Agreement and Protocol 1 on horizontal adaptations, all references in Directive 85/611 to the ‘Community’ or the ‘common market’ were deemed to refer to the EEA. The subsequent bankruptcy of Bank of Credit and Commerce International (BCCI) necessitated the increased supervision of financial intermediaries. This, in turn, necessitated the removal of obstacles such as business secrecy and bars on the disclosure of information between supervisory authorities. After Directive 85/611 had been modified to reflect these changes, the Luxembourg legislature had to make the corresponding adjustments to Luxembourg’s national standards. This was the underlying purpose of the Act of 29 April 1999,<sup>36</sup> which amended the 1988 Act in the following areas:
- (1) detailed provisions were added to step up cooperation between supervisory authorities;
  - (2) the audit obligations of UCI auditors were broadened;
  - (3) references in the 1988 Act to the EEC were partly replaced by references to the EEA.
- 1.43** *Act of 17 July 2000* Independently of the various Community initiatives, the Act of 17 July 2000<sup>37</sup> amended several further aspects of the 1988 Act, and included the following changes:
- (1) the subscription tax was reduced to 0.01 per cent for sub-funds or unit classes sold to institutional investors in UCIs governed by the 1988 Act;<sup>38</sup>

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<sup>34</sup> Grand-Ducal Regulation of 24 December 1996 adopted in application of amended Art 108, Act of 30 March 1988 concerning undertakings for collective investment, as amended by the Act of 24 December 1996 (*Mémorial A* 1996, 2914).

<sup>35</sup> The content of the Grand-Ducal Regulation of 24 December 1996 is identical to that of the Grand-Ducal Regulation of 14 April 1995, adopted in application of the Act of 23 December 1994.

<sup>36</sup> Act of 29 April 1999 concerning: (1) transposition of Directive (EC) 95/26 concerning the reinforcement of prudential supervision, in the amended Act of 5 April 1993 concerning the financial sector and in the amended Act of 30 March 1988 concerning undertakings for collective investment; (2) partial transposition of Art 7, Directive (EEC) 93/6 on the capital adequacy of investment firms and credit institutions, in the amended Act of 5 April 1993 concerning the financial sector; (3) various other modifications in the amended Act of 5 April 1993 concerning the financial sector; (4) modification of the Grand-Ducal Regulation of 19 July 1983 concerning the fiduciary contracts of credit institutions (*Mémorial A* 1999, 1301 *et seq*).

<sup>37</sup> Act of 17 July 2000 amending certain provisions of the Act of 30 March 1988 concerning undertakings for collective investment (*Mémorial A* 2000, 1226 *et seq*); commented upon in Circular 00/14.

<sup>38</sup> Art 108, para 3, 1988 Act.

- (2) in umbrella UCIs, sub-funds were segregated vis-à-vis third parties so that the assets of an individual sub-fund could only be used to offset the liabilities of that particular sub-fund unless otherwise provided in the constitutive documents.<sup>39</sup>

*Act of 21 December 2001* The Act of 21 December 2001<sup>40</sup> significantly changed the tax regime of UCIs by reducing the subscription tax rate across the board from 0.06 to 0.05 per cent (other than in respect of money market funds and funds sold to institutional investors to which the reduced subscription tax rates referred to above continued to apply).<sup>41</sup> **1.44**

*Act of 19 July 1991 concerning undertakings for collective investment whose securities are not intended for the public*

The 2002 Act and, before it, the 1988 Act apply only to UCIs whose units are intended to be placed with the public. They do not cover investment structures sold to a small circle of informed investors. Because such structures could also benefit from the UCI regulatory infrastructure, the 1991 Act introduced the concept of institutional UCIs into Luxembourg law. It was replaced some fifteen years later by the Act of 13 February 2007 relating to specialized investment funds. **1.45**

*Act of 20 December 2002 with regard to undertakings for collective investment*

**Content** Despite a few upgrades, Directive 85/611 enjoyed limited success as regards its stated objective of the free marketing of UCIs throughout Europe. **1.46**

The UCI markets had grown considerably since 1985, with UCIs investing in an increasingly diversified range of securities. Some of these, such as money market instruments, were still not considered transferable securities in all Member States. A UCI whose sole purpose was to invest in money market instruments was not freely able to distribute throughout Europe using the 'UCITS' passport in all markets. It could only claim the general principle of free movement of capital under the EC Treaty more or less respected by each host country. This was a frustrating situation for both the promoters of the relevant UCIs and the Community authorities, who wanted to give such products broader access to the internal market. **1.47**

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<sup>39</sup> Art 111(2), 1988 Act.

<sup>40</sup> Art 10, Act of 21 December 2001 reforming certain direct and indirect tax provisions (*Mémorial A 2001, 3312 et seq.*), which amends Art 108(1), 1988 Act.

<sup>41</sup> Since the coming into force of the 2002 Act, which abolishes the 1988 Act with effect from 13 February 2007, the latter has been amended again by the Act of 19 December 2003 (Art 12, Act of 19 December 2003 concerning the State revenue and expenditure budget for the fiscal year 2004 (*Mémorial A 2003, 3687 et seq.*)). The Act of 19 December 2003 grants total exemption from subscription tax to certain categories of institutional money market funds, amending both Art 129(3), Act of 2002 and Art 108(3), 1988 Act. The 1988 Act was then amended by the Act of 10 July 2005.

- 1.48** It was further felt that investor protection would be strengthened by regulating the status of management companies.
- 1.49** In addition, the fund industry expressed the need to simplify disclosure requirements, and called, *inter alia*, for the introduction of a simplified prospectus which could be provided to investors instead of the complete prospectus, thereby also facilitating the marketing of UCITS.
- 1.50** The overhaul of Directive 85/611 turned out to be a long and laborious process, finally culminating in two directives amending Directive 85/611, ie Directive 2001/107 and Directive 2001/108. The 2002 Act transposed these two directives into Luxembourg law following the structure of the 1988 Act other than in relation to new changes introduced to comply with new Community standards.
- 1.51** The 2002 Act is divided into five parts. Part I on UCITS transposed the new regime introduced by Directives 2001/107 and 2001/108 while retaining provisions from Part I of the 1988 Act which were not affected by the new Community legal framework. The changes mainly concerned the investment policies of UCITS to reflect the expanded range of authorized investments and related investment restrictions.
- 1.52** It is still possible to establish UCIs outside the Community framework pursuant to Part II of the 2002 Act, which, for the most part, is identical to Part II of the 1988 Act.
- 1.53** As in the 1988 Act, Part III contains a single provision with regard to the inward marketing into Luxembourg of foreign UCIs which are not UCITS.
- 1.54** A new Part IV on management companies reflects the new Community requirements for companies managing UCITS. It also covers the standards governing other types of management companies (ie those managing only UCIs other than UCITS), merging provisions from the 1988 Act with new provisions derived from Directive 2001/107.
- 1.55** Part V is very similar to Part IV of the 1988 Act and contains general rules applicable to UCITS and other UCIs. The new provisions inserted by the Luxembourg legislature deal with the simplified prospectus introduced under Directive 85/611, cooperation between the CSSF and foreign management company supervisory authorities, and new methods of publishing UCI sales documents.
- 1.56** Lastly, the law has two annexes. The first lists information to be supplied in sales documents (Schedule A to Directive 2001/107), periodic reports (Schedule B to Directive 2001/107), and the simplified prospectus (Schedule C to Directive 2001/107). The second annexe repeats the collective portfolio management functions listed in Directive 2001/107.

The 2002 Act came into force on 1 January 2003. Its implementation has been relatively complex in the light of the transition regime flowing from Directives 2001/107 and 2001/108 and included transitional arrangements to allow existing UCITS to conform to the new standards while also providing the benefit of UCITS authorization and a European passport under Directives 2001/107 and 2001/108 for UCITS authorized under the 2003 Act. **1.57**

To facilitate transitional arrangements, the Acts of 1988 and 2002 both had legal effect for a period of time until 13 February 2007 when the 1988 Act was finally repealed. **1.58**

UCITS authorized between 13 February 2002 and 13 February 2004 were allowed to opt to operate under the 1988 Act until 13 February 2004 when they were obliged to conform to the new UCITS rules. UCITS authorized before 13 February 2002 (the effective date for Directives 2001/107 and 2001/108) were allowed to opt to operate under the 1988 Act until 13 February 2007 at which date they had to conform with the 2002 Act. **1.59**

Management companies were also subject to a number of new rules under the 2002 Act. Companies managing UCIs other than UCITS have been governed by the 2002 Act since its effective date, ie 1 January 2003. Companies authorized before 13 February 2004 and mainly set up to manage one or more UCITS were permitted to postpone application of the new regime until 13 February 2007. As long as they operated under the old rules, they were not entitled to apply for a European passport. A UCITS governed by the 2002 Act could, until 13 February 2007, be managed by a management company not yet in compliance with the new rules.<sup>42</sup> **1.60**

#### Acts amending the 2002 Act

*Act of 19 December 2003* The Act of 19 December 2003<sup>43</sup> exempted certain categories of institutional money market funds from subscription tax, provided their residual portfolio maturity did not exceed ninety days and they had obtained the highest possible rating from a recognized rating agency. **1.61**

*Act of 15 June 2004* The Act of 15 June 2004<sup>44</sup> extended the exemption from subscription tax to UCIs established as pension pooling vehicles. **1.62**

*Act of 10 July 2005* The Act of 10 July 2005 transposes Directive 2003/71,<sup>45</sup> generally referred to as the 'Prospectus Directive'. It sets out rules on the contents **1.63**

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<sup>42</sup> This discussion needs to be considered in the light of the interpretations supplied by the CESR. See Circular 05/186, which includes the CESR's recommendations.

<sup>43</sup> Art 12, Act of 19 December 2003 concerning the State revenue and expenditure budget for the fiscal year 2004 (*Mémorial A 2003, 3687 et seq.*).

<sup>44</sup> Art 45, Act of 15 June 2004 amending Art 129(3), 2002 Act.

<sup>45</sup> Directive (EC) 2003/71 of the European Parliament and the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive (EC) 2001/34 ([2003] OJ L345/64 *et seq.*).

and dissemination of a prospectus in the case of a public offering or listing of transferable securities on a regulated market in Luxembourg. Insofar as they are governed by special legislation, UCIs generally fall outside its sphere of application with the exception of closed-end UCIs, ie UCIs whose unitholders are not allowed to redeem their units under any circumstances.<sup>46</sup> To avoid a combination of requirements for the issue of prospectuses by closed-end UCIs under both the 2002 Act and the Act of 10 July 2005, the 2002 Act was amended so that the issue of prospectuses by closed-end UCIs is exclusively governed by the Act of 10 July 2005.

- 1.64** The Act of 10 July 2005 also modified the treatment of foreign UCIs (other than coordinated UCITS) which are closed-ended within the meaning of the Act of 10 July 2005, to permit the marketing of their units in or from Luxembourg provided such closed-end UCIs comply with the Act of 10 July 2005.<sup>47</sup>
- 1.65** *Act of 13 February 2007* The Act of 13 February 2007 slightly amended the 2002 Act, so as to exempt from subscription tax an investment in a SIF made by a UCI.<sup>48</sup>

*Act of 13 February 2007 relating to specialized investment funds*

- 1.66** The 1991 Act dealing with funds sold to institutional investors is a precise piece of legislation containing only seven articles and cross-referring for the most part to the 1988 Act. As a result of the repeal and replacement of the 1988 Act with new legislation on UCIs in 2002, it was necessary to amend the 1991 Act and the Luxembourg legislature took the opportunity of adopting a comprehensive and independent body of rules to replace the 1991 Act. This provided an opportunity to modernize the rules applying to institutional funds, bringing a larger pool of well-informed investors<sup>49</sup> within its scope, and to classify institutional funds as 'specialized investment funds'. The governing rules for specialized investment funds were simplified, although largely modelled on Part II of the 2002 Act. The main objective was to adapt the rules on institutional funds to meet an increased

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<sup>46</sup> Closed-end UCIs are determined in juxtaposition to open-end UCIs, defined by Directive (EC) 2003/71 as follows: 'collective investment undertaking other than the closed-end type' means unit trusts and investment companies: (1) the object of which is the collective investment of capital provided by the public, and which operate on the principle of risk-spreading; (2) the units of which are, at the holder's request, repurchased or redeemed, directly or indirectly, out of the assets of these undertakings.

<sup>47</sup> Art 76, 2002 Act.

<sup>48</sup> Art 72, Act of 13 February 2007.

<sup>49</sup> For further details concerning the concept of well-informed investor, see 2.61 *et seq* below.



demand for alternative investment structures, such as hedge funds, real estate funds or private equity funds.<sup>50</sup>

### Circulars issued by the supervisory authorities

Since the end of the 1970s, the supervisory authority has laid down, in the form of circulars, the rules governing the operation of UCIs and SICARs. However, the concept of a circular does not technically form part of Luxembourg's legal panoply. **1.67**

The 2002 Act<sup>51</sup> permits the adoption of standards governing the operation or risk diversification of certain types of UCIs in the form of Grand-Ducal regulations subject to the recommendation of the supervisory authority. However, the CSSF has always preferred to issue circulars in order to ensure optimum flexibility and adaptability of its rules rather than recommending the adoption of Grand-Ducal regulations. **1.68**

In the 1970s and 1980s, numerous circulars were issued by the CSSF (and its predecessors, the *Institut Monétaire Luxembourgeois* and the Banking Commissioner). Circular 91/75 of 21 January 1991 revised and reviewed the rules applicable to Luxembourg-based UCIs governed by the 1988 Act. The same circular repealed and replaced previous circulars. The application and interpretation of the 2002 Act is not yet covered by a general circular such as Circular 91/75, so that Circular 91/75 largely remains in force. **1.69**

The main circulars on UCIs and SICARs currently in force are as follows: **1.70**

- IML Circular 91/75 of 21 January 1991;
- CSSF Circular 00/14 of 27 July 2000 on the adoption of the Act of 17 July 2000 amending certain provisions of the Act of 30 March 1988;
- CSSF Circular 02/77 of 27 November 2002 on the protection of investors in the event of net asset value calculation error and the correction of consequences resulting from non-compliance with the investment rules applicable to UCIs;
- CSSF Circular 02/80 of 5 December 2002 on the specific rules applicable to Luxembourg UCIs pursuing alternative investment strategies;
- CSSF Circular 02/81 of 6 December 2002 on guidelines concerning the duties of auditors of UCIs;

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<sup>50</sup> For further details on the genesis of the Act of 13 February 2007, see M Moulla and M Chantalangsy, 'Presentation of the law of 2007 compared to other existing legislation governing collective investment structures—historical overview of the law of 2007' in *Specialised Investment Funds* (Arendt & Medernach, 2007) 14, 15.

<sup>51</sup> Arts 67, 72, and 75, 2002 Act.

- CSSF Circular 03/87 of 21 January 2003 on the coming into force of the 2002 Act;
- CSSF Circular 03/88 of 22 January 2003 on the classification of UCIs governed by the provisions of the 2002 Act;
- CSSF Circular 03/97 of 28 February 2003 on the publication in the electronic database for the financial centre (*Référentiel de la place*) of simplified and full prospectuses and the annual and half-yearly reports by UCIs;
- CSSF Circular 03/108 of 30 July 2003 on Luxembourg management companies subject to the provisions of Chapter 13 of the 2002 Act, and Luxembourg self-managed investment companies subject to Article 27 or Article 40 of the 2002 Act;
- CSSF Circular 03/122 of 19 December 2003 on clarifications concerning the simplified prospectus;
- CSSF Circular 04/146 of 17 June 2004 on the protection of UCIs and their investors against late trading and market timing practices;
- CSSF Circular 04/151 of 13 July 2004 on the information to be published in the listing particulars of the securities listed below:
  - shares and units of foreign UCIs whose securities are not publicly available, offered or sold in or from Luxembourg, and
  - securities redeemable or exchangeable for shares or units of UCIs or whose income and/or redemption is/are linked to underlying shares or units of UCIs;
- CSSF Circular 04/155 of 27 September 2004 on the compliance function;
- CSSF Circular 05/176 of 5 April 2005 on the rules of conduct to be adopted by UCITS in relation to the use of financial derivative instruments;
- CSSF Circular 05/177 of 6 April 2005 on the abolition of any prior approval by the CSSF of advertising material used by persons and companies supervised by the CSSF; revocation of point II of Chapter L of IML Circular 91/75; revocation of the two last sentences of point IV 5.11 of CSSF Circular 2000/15;
- CSSF Circular 05/178 of 11 April 2005 on administrative and accounting organization; outsourcing of IT services; revocation of point 4.5.2 of IML Circular 96/126 and substitution with point 4.5.2 of Circular 05/178;
- CSSF Circular 05/185 of 24 May 2005 on Luxembourg management companies subject to the provisions of Chapter 13 of the 2002 Act, and Luxembourg self-managed investment companies subject to the provisions of Article 27 or Article 40 of the 2002 Act;
- CSSF Circular 05/186 of 25 May 2005 on the guidelines of the Committee of European Securities Regulators (CESR) regarding the application of transitional

- measures resulting from Directives (EC) 2001/107 and (EC) 2001/108 (UCITS III) amending Directive (EEC) 85/611 (UCITS I);
- CSSF Circular 05/188 of 27 May 2005 on the coming into force of the Act of 12 November 2004;
  - CSSF Circular 05/210 of 10 October 2005 on the drawing-up of a simplified prospectus within the scope of Chapter 1 of Part III of the Act on prospectuses for securities;
  - CSSF Circular 05/211 of 13 October 2005 on combating money laundering and terrorist financing and the prevention of the use of the financial sector for money laundering and terrorist financing purposes;
  - CSSF Circular 05/225 of 16 December 2005 on the concept of 'offer to the public of securities' as defined in the Act on prospectuses for securities and the consequential 'obligation to publish a prospectus';
  - CSSF Circular 05/226 of 16 December 2005 on the general overview of the Act on prospectuses for securities and technical specifications regarding communications to the CSSF of documents with a view to authorization or for filing and of notices for offers to the public and admissions to trading on a regulated market;
  - CSSF Circular 06/241 of 5 April 2006 on the concept of risk capital under the Act of 15 June 2004;
  - CSSF Circular 06/267 of 22 November 2006 on technical specifications regarding the filing with the CSSF, in accordance with the Act on prospectuses for securities, of documents for approval or notification purposes and of notices for offers to the public of units/shares of Luxembourg closed-end UCIs and admissions of units/shares of Luxembourg closed-end UCIs to trading on a regulated market;
  - CSSF Circular 06/272 of 21 December 2006 on technical specifications regarding the filing with the CSSF, in accordance with the Act on prospectuses for securities, of documents for approval or notification purposes and of notices for offers to the public of securities issued by SICARs and admissions of securities issued by SICARs to trading on a regulated market;
  - CSSF Circular 07/277 of 9 January 2007 on the new notification procedure following guidelines issued by the Committee of European Securities Regulators (CESR) regarding the simplification of the UCITS notification procedure;
  - CSSF Circular 07/283 of 28 February 2007 on the entry into force of the Act of 13 February 2007;
  - CSSF Circular 07/290 of 3 May 2007 on the definition of capital ratios pursuant to Article 56 of the 1993 Act (application to investment firms and management companies subject to Chapter 13 of the 2002 Act, as amended);

- CSSF Circular 07/307 of 31 July 2007 on the MiFID Directive: Conduct of business rules in the financial sector;
  - CSSF Circular 07/308 of 2 August 2007 on the rules of conduct to be adopted by UCITS with respect to the management of financial risk and the use of derivative financial instruments;
  - CSSF Circular 07/309 of 3 August 2007 on risk-spreading in the context of SIFs;
  - CSSF Circular 07/310 of 3 August 2007 on financial information to be provided by SIFs, as amended by CSSF Circular 08/348;
  - CSSF Circular 08/339 of 19 February 2008 on the guidelines of the Committee of European Securities Regulators (CESR) concerning eligible assets for investment by UCITS;
  - CSSF Circular 08/348 of 17 April 2008 on the changes to Circulars IML 97/136 and CSSF 07/310;
  - CSSF Circular 08/350 of 22 April 2008 on clarifications relating to the amendments introduced by the Act of 13 July 2007 to the status of professionals of the financial sector (PFS) referred to in Articles 29-1, 29-2, 29-3, or 29-4 and designated as ‘support PFS’, and on the amendment to the prudential supervisory procedures for support PFS;
  - CSSF Circular 08/356 of 4 June 2008 regarding rules applicable to UCIs which employ certain techniques and instruments relating to transferable securities and money market instruments.
- 1.71** The circulars are a highly appropriate regulation tool for UCIs, which require a legal framework that can be easily and rapidly adapted to needs of the investment industry.
- 1.72** Since the constitutional reform of 19 November 2004,<sup>52</sup> the CSSF has been authorized to adopt regulations within the framework of its responsibilities, provided it has the necessary regulatory authority under the relevant law.
- 1.73** While the Constitution only refers to the adoption of regulations by the CSSF this does not of itself mean that the CSSF is restricted from prescribing circulars in areas where it has regulatory authority. Circulars are typically used to specify certain legal norms whereas the CSSF has adopted circulars as a means of informing

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<sup>52</sup> Art 108*bis* of the Constitution, amended by the Act of 19 November 2004 with regard to (1) amendment of Arts 11(6), 32, and 76 of the Constitution; and (2) the creation of a new Art 108*bis* in the Constitution (*Mémorial A* 2004, 2784). This constitutional amendment followed the decision of 7 March 2003 of the Constitutional Court of the Grand Duchy of Luxembourg (*Mémorial A* 2003, 656) that the power to adopt regulations and decisions to implement legislation in accordance with Art 36 of the Constitution is in the hands of the Grand Duke. A law or regulation entrusting this power to an authority other than the Grand Duke is unconstitutional.

third parties of its general policy positions on various matters. As derogations from such positions are possible, it is difficult to argue that they decree or specify rigid legal norms. Circulars as issued by the CSSF are not so much a form of regulation as a tool to ensure transparency and adaptability.

*Laws and regulations not limited to UCIs*

Though not specifically limited to UCIs, two additional bodies of rules also apply in all standards governing such funds. **1.74**

The first is the 1915 Act, which has the status of a supplementary standard vis-à-vis UCIs.<sup>53</sup> It applies to situations not specifically legislated for by the 2002 Act and the Act of 13 February 2007. **1.75**

The second is the Luxembourg Civil Code, which governs the contractual structure underlying FCPs. It also governs civil companies in general and as such applies to investment companies, save to the extent otherwise provided for by the 1915 Act, the 2002 Act, or the Act of 13 February 2007. **1.76**

## **Role of the CSSF**

### *General presentation*

The CSSF is a public law body established with legal status by the Luxembourg State. Its object is to maintain prudential supervision of the financial sector.<sup>54</sup> Within this role, it oversees UCIs established or marketing their units in the Grand Duchy of Luxembourg.<sup>55</sup> It also supervises management companies of UCIs.<sup>56</sup> **1.77**

The CSSF actively engages in its supervisory duties in connection with UCIs. Its duties and involvement vary under the applicable regulations depending on whether the UCI is based in Luxembourg<sup>57</sup> or is a non-Luxembourg coordinated UCITS with a European passport, or a non-Luxembourg UCI which is not a UCITS. **1.78**

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<sup>53</sup> Arts 26, 40, and 71, 2002 Act.

<sup>54</sup> Arts 2 and 3, Act of 23 December 1998 concerning the creation of a Commission for the supervision of the financial sector (*Mémorial* A 1998, 2985).

<sup>55</sup> For other comments on this issue, see 8.01 *et seq* below. See also A Elvinger, 'Le rôle des autorités de surveillance' *ALFI Yearbook* 1994, 33; C Kremer and J Baden, 'The role of the Luxembourg Monetary Institute in the supervision of undertakings for collective investment,' (February 1995) 3, 63, *World Fund Industry/Gestion collective internationale*.

<sup>56</sup> Arts 77 to 92, 2002 Act.

<sup>57</sup> Part I or Part II, 2002 Act or Act of 13 February 2007.

- 1.79** The CSSF also supervises management companies for UCIs based in Luxembourg. It supervises foreign entities only when operating under the European passport introduced by Directive 85/611. In such cases, its intervention is minimal as the primary regulatory authority is the supervisory authority in the company's home State.
- 1.80** Generally speaking, the CSSF has very extensive powers in its interpretation of the Act of 13 February 2007 and the 2002 Act. In the exercise of those powers, it has specified the meaning of certain concepts, such as overall risk connected with derivatives.<sup>58</sup> The 2002 Act also enables it to designate UCITS classes, which, whilst investing in transferable securities, cannot be regarded as coordinated UCITS entitled to the European passport under Directive 85/611. Last but not least, the 2002 Act refers to a proposed Grand-Ducal regulation to be issued in order to lay down specific rules with regard to certain provisions of the Act. As mentioned above, rather than recommending the adoption of a Grand-Ducal regulation, the CSSF has issued various circulars<sup>59</sup> detailing the principles adopted by it in its supervisory role in relation to matters not settled by the Act.

### *Supervision of UCIs*

#### **UCIs established in the Grand Duchy of Luxembourg**

- 1.81** The CSSF is responsible for authorizing UCIs established in the Grand Duchy of Luxembourg. Accordingly, it receives the incorporation documents and various other documents and information about each UCI. If, after examining such papers, it believes that the investor information is adequate and reflects the applicable legal standards, it adds the UCI to the official list of UCIs. However, registration does not indicate approval of a UCI's investment objectives or investments, or of its ability to meet its objectives.
- 1.82** UCIs remain on the official list as long as they comply with the rules governing their operation and sales of units. The CSSF checks compliance against the monthly, semi-annual, and annual reports received from each UCI and against any other information requested by it. Similarly, it authorizes in advance proposed modifications to incorporation documents.
- 1.83** In addition, the CSSF is authorized to grant certain derogations from the 2002 Act.<sup>60</sup> It may waive the application of certain legal requirements for UCITS covered by Part I of the 2002 Act. It has more extensive powers in this regard with respect to UCIs governed by Part II of the 2002 Act and the Act of 13 February 2007.

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<sup>58</sup> Circular 05/176.

<sup>59</sup> Primarily Circular 91/75 and, as regards SIFs, Circular 07/309.

<sup>60</sup> Arts 45(1) and 116, 2002 Act.

The CSSF exerts wider control over so-called 'self-managed' investment companies, which are subject to similar share capital and management obligations as management companies themselves.<sup>61</sup> **1.84**

The CSSF also has the power to impose penalties. In particular, it may remove a UCI from the official list if it violates the laws and regulations governing its operation or the sale of its units. **1.85**

### **UCIs established in foreign countries**

#### *Coordinated UCITS*

Coordinated UCITS benefit from the rules governing the free movement of capital and freedom to provide services under Directive 85/611. This allows coordinated UCITS approved by the supervisory authority of the Member State in which they are established (the 'home State') to market their units freely in another Member State of the EEA (the 'host State'). **1.86**

Only those aspects not covered by Directive 85/611 remain under the supervisory authority of the host State, such as information to be provided to the public, as to which the supervisory authority of the host State may lay down special requirements.<sup>62</sup> **1.87**

Pursuant to those principles, the CSSF has only limited authority over foreign UCITS governed by Directive 85/611. Foreign UCITS must nevertheless inform the CSSF of their intention to market their units in the Grand Duchy of Luxembourg and provide it with certain documents. The CSSF may prohibit marketing only on the grounds listed in Directive 85/611.<sup>63</sup> **1.88**

#### *Other UCIs under foreign law*

Foreign open-end UCIs, within the meaning of the Act of 10 July 2005, other than coordinated UCITS, must be authorized by the CSSF if they wish to market their units in the Grand Duchy of Luxembourg. They are only authorized by the CSSF when subject, in their home State, to permanent supervision by a supervisory authority created by law to protect investors. Such UCIs remain on the official list of the CSSF as long as they comply with the Luxembourg rules governing their operation and sales of units.<sup>64</sup> **1.89**

Foreign closed-end UCIs, within the meaning of the Act of 10 July 2005, may market their units in the Grand Duchy of Luxembourg subject to compliance **1.90**

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<sup>61</sup> Art 27, 2002 Act. For details see 6.77 *et seq* below.

<sup>62</sup> Art 58, 2002 Act.

<sup>63</sup> Art 60, 2002 Act.

<sup>64</sup> Art 76, 2002 Act.

with the Act of 10 July 2005. They are not subject to the supervisory authority provided for by the 2002 Act.<sup>65</sup>

### *Supervision of management companies*

#### **Management companies established in the Grand Duchy of Luxembourg**

- 1.91** The right to carry on the activity of a management company established in Luxembourg is subject to prior authorization. This is granted either by the CSSF or by the Minister with responsibility for the CSSF (in the case of a management company for foreign UCIs other than coordinated UCITS).<sup>66</sup> All applications are reviewed by the CSSF, whether or not the UCI in question is established in Luxembourg or another jurisdiction. This said, companies which only manage foreign UCIs other than coordinated UCITS require another type of authorization in Luxembourg than that for UCITS management companies. UCITS management companies may also manage UCIs other than coordinated UCITS, in which case they are subject to slightly different rules.
- 1.92** A management company seeking authorization must comply with a series of conditions set out in the 2002 Act<sup>67</sup> or, when it only engages in the management of foreign UCIs other than UCITS, the 1993 Act.<sup>68</sup> The same rules apply to a management company wishing to retain its authorization.<sup>69</sup> On an ongoing basis, the CSSF checks compliance by management companies with their obligations, particularly through the quarterly information they are obliged to supply.<sup>70</sup> The auditor of the relevant management company in fulfilling the auditor's role envisaged under the Acts of 2002<sup>71</sup> and 1993<sup>72</sup> also plays an important role in the continued retention of a management company's authorization.
- 1.93** Withdrawal of a management company's authorization is the ultimate penalty for non-compliance with the laws and regulations governing its authorization and activities. The CSSF determines whether an authorization should be withdrawn, although it does not have discretionary power to do so. An authorization may only be withdrawn when the CSSF observes that the management company in question comes within one of the situations listed in the 2002 Act<sup>73</sup> or in the 1993 Act,<sup>74</sup> as

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<sup>65</sup> *ibid.*

<sup>66</sup> Arts 77(1) and 91(1), 2002 Act; Art 14(1), Act of 1993.

<sup>67</sup> Arts 77–80, 91, and 92, 2002 Act.

<sup>68</sup> Arts 15 to 22-1 and 28-8, 1993 Act.

<sup>69</sup> Arts 82–86, 91, and 92, 2002 Act; Art 23(4), 1993 Act.

<sup>70</sup> Section III, Circular 03/108.

<sup>71</sup> Arts 80 and 92, 2002 Act.

<sup>72</sup> Art 22, 1993 Act.

<sup>73</sup> Arts 78(5) and 91(5), 2002 Act.

<sup>74</sup> Art 23, 1993 Act.



the case may be. Under the 2002 Act the CSSF may grant management companies a limited period to comply with the applicable laws and regulations or to cease their activity.<sup>75</sup>

### **Management companies established in foreign countries**

Management companies of UCITS approved as such in foreign countries may, by virtue of their European passport, establish themselves in Luxembourg or provide in Luxembourg the services set out in Directive 85/611 without having to seek additional authorization from the CSSF.<sup>76</sup> The notification procedure by which the authorities in the home State inform the CSSF, as set out in Directive 85/611, is the only applicable formality.<sup>77</sup> The CSSF has limited powers in this respect. It informs the management company of the general interest rules governing its activity in Luxembourg and any applicable rules of conduct if the company in question engages in Luxembourg in portfolio management for entities other than UCIs, the provision of investment advice or the acceptance of deposits.<sup>78</sup> The CSSF may decline permission to a management company wishing to market units of UCIs managed by it, if the CSSF notes that the activity violates the relevant provisions in Directive 85/611.<sup>79</sup> **1.94**

The CSSF authorizes foreign management companies other than coordinated management companies when they want to manage a UCI in Luxembourg other than a coordinated UCITS<sup>80</sup> or a SIF. In principle, the CSSF requires such companies to be subject to prudential control in their country of origin, allowing it to trust in supervision it has every reason to consider effective. **1.95**

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<sup>75</sup> eg this power can be exercised by the CSSF when a management company no longer complies with the legal requirements with respect to share capital (Art 82, 2002 Act).

<sup>76</sup> See 6.195 below.

<sup>77</sup> Art 6a, Directive (EEC) 85/611.

<sup>78</sup> *ibid* Arts 6a, points 4 and 6, and 6b, points 3 and 4.

<sup>79</sup> *ibid* Art 6a, point 5.

<sup>80</sup> Art 93(3), 2002 Act.

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